

## Missouri Attorney General's Opinions - 1982

Opinion	Date	Topic	Summary
<a href="#">1-82</a>	Feb 22		Opinion letter to Paul R. Ahr, Ph.D., M.P.A.
2-82			Withdrawn
<a href="#">6-82</a>	July 8	DRUGS. MEDICINE. PRESCRIPTIONS. PRACTICE OF MEDICINE. PHYSICIANS AND SURGEONS. PHARMACISTS. ANTITRUST.	A physician who requires that his patient accept drugs dispensed by the physician and refuses to provide the patient a prescription for such drugs which can be filled at a pharmacy of the patient's choice may be in violation of the Missouri Antitrust Law and Section 334.100.2(5), RSMo Supp. 1981; a physician who instructs or requires a patient to use a pharmacy in which the physician has a financial interest to fill a drug prescription may be in violation of the Missouri Antitrust Law and Section 334.100.2(5), RSMo Supp. 1981; a physician may not delegate to any person other than a licensed physician or pharmacist the preparation or dispensing of a prescription drug, but may allow an unlicensed person to prepare and affix, under his supervision, the label for such prescription; and a physician may not prescribe a drug by its brand or trade name and then dispense a therapeutically equivalent generic drug in a container labeled with the brand or trade name.
<a href="#">7-82</a>	Jan 14	STATE EMPLOYEES' RETIREMENT SYSTEM. INVESTMENT OF STATE RETIREMENT SYSTEM FUNDS.	The Board of Trustees of the Missouri State Employees' Retirement System may invest the funds of the system in the common stock of any corporation organized under the laws of the United States, or of any state, which has a good earnings growth but elects not to pay a cash dividend, subject to the limitations in Section 379.080.1, RSMo Supp. 1981, on the amount of stock purchased, which are enumerated in the body of this opinion. The Board of Trustees of the Missouri State Employees' Retirement System may also invest in the common stock of any solvent corporation organized under the laws of any territory or possession of the United States, or of the District of Columbia, or of Canada or any Canadian province, subject to the requirements expressed in Section 376.305, RSMo 1978, which are also enumerated in the body of this opinion. Both of the above permissible investments are subject to the prudent man rule regarding investments by trustees as expressed in Missouri court decisions.
<a href="#">8-82</a>	Jan 26		Opinion letter to Mary-Jean Hackwood
<a href="#">9-82</a>	Oct 12	BIDS. CONTRACTS. INSURANCE. SCHOOLS.	Pursuant to Section 67.150, RSMo Supp. 1981, and with specific reference to the types of insurance authorized by that section: All renewals of presently existing insurance contracts of political subdivisions must be competitively bid. A political subdivision need not

			<p>rebid its insurance contracts annually; a political subdivision may not enter into a contract that would create an indebtedness in excess of the revenue and income for the current year plus any unencumbered balances from previous years. Any proposed material modification of an insurance contract requires that the contract be rebid. A political subdivision may accept only those bids which meet the specifications established by the political subdivision. The determination of the "lowest and best" bid properly lies within the discretion of the authorities of the political subdivision.</p>
<a href="#">10-82</a>	Oct 8	<p>AIR CONSERVATION COMMISSION. CITIES, TOWNS AND VILLAGES. COUNTY COURTS. DEPARTMENT OF NATURAL RESOURCES. STATE PROPERTY.</p>	<p>A city or county holding a certificate of authority from the Missouri Air Conservation Commission may adopt ordinances or resolutions to regulate emissions from state-owned air contaminant sources, may adopt ordinances or resolutions which require the state to obtain a permit prior to enlarging a state-owned air pollution source, may adopt ordinances or resolutions which authorize the inspection of state-owned air contaminant sources, and may by ordinance or resolution require emission inventories from and source testing of state-owned air contaminant sources.</p>
<a href="#">13-82</a>	Sept 29	<p>CITIES, TOWNS AND VILLAGES. COUNTY COURTS. LANDFILLS. NATURAL RESOURCES, DEPARTMENT OF. SOLID WASTES.</p>	<p>A second class county may, pursuant to Sections 260.215.2 and 260.215.4, RSMo, adopt a reasonable ordinance or regulation regarding the location of landfills within the unincorporated areas of the county, without becoming responsible for the requirements placed on cities and counties by Section 260.215.1. In the adoption of such an ordinance or regulation, the county court must follow the procedures outlined in Section 260.215.4. Such an ordinance or regulation, if adopted by the county, would be applicable to a third class city which proposes to locate a landfill in the unincorporated areas of the county.</p>
<a href="#">14-82</a>	Mar 25	<p>CITY-COUNTY LIBRARIES. LIBRARY DISTRICTS. INDEBTEDNESS. CONSTITUTIONAL LAW.</p>	<p>A city-county library district organized under Chapter 182, RSMo, may borrow short term funds for operating expenses.</p>
<a href="#">15-82</a>	Nov 9		<p>Opinion letter to The Honorable Larry Mead</p>
<a href="#">16-82</a>	Feb 25		<p>Opinion letter to The Honorable Clarence H. Heflin</p>
<a href="#">17-82</a>	Feb 1	<p>MOBILE HOMES. REAL ESTATE BROKERS. PUBLIC SERVICE COMMISSION.</p>	<p>A person who sells or offers for sale four or more mobile homes in any consecutive twelve-month period must register with the Public Service Commission as a dealer, pursuant to Chapter 700, RSMo 1978, regardless of whether such person owns the mobile homes he or she sells or whether such person merely acts as an agent for a mobile home owner who wishes to sell only one mobile home.</p>

<a href="#">18-82</a>	Dec 23		Opinion letter to The Honorable James F. Antonio
<a href="#">20-82</a>	Mar 4	CLEAN WATER COMMISSION. WATER POLLUTION. PERMITS. NATURAL RESOURCES, DEPARTMENT OF.	Section 204.051.3, RSMo 1978, does not allow the issuance of general permits as contemplated under 40 CFR 122.59. Section 204.051.3 does allow the issuance of general permits as provided in Clean Water Commission regulation 10 CSR 20-6.010. Sections 204.006 to 204.141, RSMo 1978, provide adequate authority to enforce any general permit issued pursuant to state law.
<a href="#">21-82</a>	Sept 27	AMBULANCE DISTRICTS. CITIES, TOWNS & VILLAGES. COUNTY COURT. JAILS. PRISONERS.	Cities or counties must provide necessary medical care for persons in their legal custody. Such cities and counties are responsible for the initial payment for necessary medical services when such payment is required prior to medical care being provided. Ambulance services are not required to furnish prisoners non-emergency transportation.
<a href="#">22-82</a>	Mar 22	HANCOCK AMENDMENT. CONSTITUTIONAL LAW. STATE REVENUES.	The proceeds received by the state in fiscal year 1981 from general obligation bonds issued by it constitute neither general nor special revenues of the state and are to be excluded from computations of total state revenue under Article X, Sections 16 to 24, Missouri Constitution.
<a href="#">23-82</a>	Apr 5	DEPARTMENT OF MENTAL HEALTH. MENTAL HEALTH. TAXATION.	The Department of Mental Health may discharge persons from its placement program pursuant to discharge procedures and criteria established in Chapters 632 and 633, RSMo Supp. 1981. An individual who meets the criteria for placement in a placement program but not the criteria for admission to facility hospitalization may not be transferred from the former to the latter. The department may not continue to serve persons in a placement program who do not qualify for such treatment.
<a href="#">24-82</a>	Mar 25	DIVISION OF INSURANCE. WORKERS' COMPENSATION. SECOND INJURY FUND. OFFICE OF ADMINISTRATION:	The Office of Administration must pay a workers' compensation assessment assessed by the director of the Division of Insurance pursuant to Section 287.730, RSMo 1978, the Office of Administration must file a return with the director of the Division of Insurance similar to that required by Section 287.710, RSMo Supp. 1981, and the Office of Administration is required to pay the Second Injury Fund assessment established in Section 287.715, RSMo 1978.
<a href="#">25-82</a>	Oct 8	COMPENSATION. CONSTITUTIONAL LAW. OFFICERS. STATE TAX	Pursuant to the provisions of Article VII, Section 13, Missouri Constitution, no member of the State Tax Commission was entitled to the increase in compensation provided for such members under House Bill 841 or House Committee Substitute for House Bill 77, 79th General Assembly, First Regular Session, until he assumed a new term of office.

		COMMISSION.	
<a href="#">26-82</a>	Feb 1	CITIES, TOWNS, AND VILLAGES. RECREATION AND RECREATIONAL GROUNDS. CONSTITUTIONAL LAW. RELIGION.	An incorporated village may construct recreational facilities such as outdoor basketball or tennis courts with village funds and may lease property for this purpose from a church or not-for-profit civic organization.
<a href="#">28-82</a>	Dec 13	AIRCRAFT TAXATION. COMPENSATION. COUNTIES. COUNTY COLLECTORS. TAXATION. UTILITIES.	Utility and aircraft taxes are local taxes within the provisions of Section 52.260, RSMo, and are subject to the collection fee provided for therein. Such fees, when collected by a second class county collector who is paid a salary, must be paid to the county treasury pursuant to Section 50.350, RSMo.
<a href="#">29-82</a>	Oct 25		Opinion letter to The Honorable James F. Antonio
<a href="#">30-82</a>	Oct 18	GOVERNOR. DEPARTMENT OF PUBLIC SAFETY. MILITARY. ADJUTANT GENERAL. NATIONAL GUARD.	An executive order of the governor is required to direct the organization of the Missouri reserve military force.
<a href="#">31-82</a>	Jan 14	AMBULANCE DISTRICTS. ANNEXATION ELECTIONS. ELECTION EXPENSE AND EXPENDITURES. COUNTY COURT. COUNTY ELECTIONS.	Sections 115.063, RSMo 1978, and 115.065, RSMo Supp. 1981, require that the costs of an election for annexation of land to an ambulance district be borne by the county court which submits the question to the voters pursuant to Section 190.070, RSMo 1978.
<a href="#">33-82</a>	Feb 26	CART (COUNTY AID ROAD TRUST FUND). SPECIAL ROAD DISTRICTS. ROAD AND BRIDGES. COUNTIES.	A county court, pursuant to a plan adopted in accordance with Section 231.441, RSMo, may require special road districts to provide matching funds in actual dollars or otherwise, in order to receive CART funds from the county in which the special road district is located.
<a href="#">34-82</a>	Feb 18		Opinion letter to The Honorable Vernon E. Bruckerhoff
<a href="#">36-82</a>	Jan 21	SOLID WASTE. CITY-COUNTY	One or more cities and/or counties may enter into a contract for solid waste collection and for operation of a solid waste disposal facility.

		AGREEMENTS. CITIES, TOWNS AND VILLAGES. COUNTIES.	Cities and/or counties may not form a corporation to contract for and operate a solid waste disposal facility and may not jointly issue bonds to construct a solid waste processing facility.
<a href="#">38-82</a>	Jan 14	PEACE OFFICERS. POLICE TRAINING. CRIMINAL COSTS. CRIMINAL FEES. COUNTY FUNDS.	County funds generated by the collection of fees for violations of the general criminal laws of the state, pursuant to Section 590.140.1, RSMo 1978, may not be used to train municipal police officers.
<a href="#">39-82</a>	Jan 7	COUNTY CLERKS. FOURTH CLASS CITIES. ASSESSMENT BOOKS. FEES.	The county clerk of a third class county must deliver to the mayor of any fourth class city within the county which does not elect an assessor a certified abstract from his assessment books of all property within the city subject to taxation by the state and the assessed value thereof and must perform this service without charge.
<a href="#">40-82</a>	Apr 26	COUNTY SHELTERED WORKSHOPS. COUNTY LAND. INDEBTEDNESS.	The board of directors of a sheltered workshop or residence facility may hold title to property. Such a board does not have authority to borrow money to purchase property and construct facilities.
<a href="#">41-82</a>	Jan 7		Opinion letter to The Honorable Travis Morrison
<a href="#">42-82</a>	Jan 14		Opinion letter to Edward D. Daniel
<a href="#">43-82</a>	May 13		Opinion letter to The Honorable Hardin Cox
<a href="#">44-82</a>	May 24	DRUGS. MEDICINE. PRESCRIPTIONS. PHARMACISTS. PHYSICIANS AND SURGEONS.	<p>(1) A licensed pharmacist may permit an unlicensed person to perform all steps incident to compounding, dispensing, labeling, and selling prescription drugs at retail, provided that the unlicensed person acts at all times in the presence of the licensed pharmacist and under his direct supervision.</p> <p>(2) A licensed pharmacist need not personally perform the selection from bulk inventory of the type, strength, and dosage of the drug prescribed, but must personally inspect and verify the accuracy and completeness of the label affixed to the prescription drug container and must verify the correctness of the contents of the drug container, before it is delivered or sold to the patient at retail.</p> <p>(3) A physician may only allow an unlicensed person to prepare and affix, under his supervision, the label required by law to a medication he dispenses, and must personally perform all other aspects of the compounding and dispensing of his own prescription medications.</p> <p>(4) The dispensing physician must personally perform the selection</p>

			from inventory of the type, strength, and dosage of the drug he prescribed; he must personally verify the accuracy and completeness of the contents of the label affixed to the patient's prescription container; and he must personally verify that the drug in the prescription container is in fact the drug indicated upon the prescription label.
<a href="#">45-82</a>	June 22	MISSOURI HOUSING DEVELOPMENT COMMISSION. STATE AUDITOR. COMMISSIONER OF ADMINISTRATION. REORGANIZATION ACT. STATE AGENCY. MERIT SYSTEM. STATE PURCHASES. TRAVEL EXPENSE AND ALLOWANCES.	The Missouri Housing Development Commission may contract for independent auditing or accounting services without the approval of the state auditor; MHDC is not subject to the rules and regulations concerning travel and subsistence expenses promulgated by the Office of Administration pursuant to Section 33.090, RSMo 1978, MHDC is not subject to the state purchasing act, Chapter 34, RSMo 1978; MHDC may enter into contracts with independent accounting and auditing personnel and may pay its executive director a salary higher than that specified in the Department of Consumer Affairs, Regulation and Licensing departmental plan; MHDC employees must be appointed through the merit system in accordance with (and with the exceptions noted in) Section 6, Appendix B(1), RSMo 1978.
<a href="#">46-82</a>	Dec 6	CONSTITUTIONAL LAW. HANCOCK AMENDMENT. PROPERTY TAX. REASSESSMENT. TAX LEVY. TAXATION - TAX RATE.	Section 137.073, RSMo Supp. 1982 , does not violate the provisions of Article X, Section 22(a), Missouri Constitution, unless the operation of such statute is less restrictive than the operation of Article X, Section 22(a).
<a href="#">47-82</a>	Mar 19	STATE CONTRACTS. DEPARTMENT OF MENTAL HEALTH.	The Department of Mental Health under Section 630.640, RSMo Supp. 1981, must require vendors receiving Department funds through contract to utilize Section 8 housing assistance payments (14 U.S.C. § 1437f) before using state funds. However, because county or St. Louis City funds derived through Section 205.968, RSMo 1978 et seq., and philanthropic funds such as those received from the United Way or other fund raising activities, are not “public assistance benefits” for purposes of Section 630.640, RSMo Supp. 1981, the Department of Mental Health may not require such vendors to utilize these moneys before charging the state for client services.
<a href="#">48-82</a>	Apr 27	CRIMINAL PROCEEDINGS. CRIMINAL PROCEDURE.	The time limits prescribed in Section 545.780, RSMo 1978, (1) do not apply to felony cases pending in associate circuit court awaiting preliminary hearings, (2) do apply to misdemeanor cases pending in associate circuit court awaiting trial, and (3) do not apply to ordinance

		CRIMINAL LAW. INFORMATIONS. INDICTMENTS. ARRAIGNMENT.	violations where convictions have been obtained in the city's municipal court and thereafter appealed to associate circuit court.
<a href="#">51-82</a>	Feb 25		Opinion letter to Dr. Arthur L. Mallory
<a href="#">53-82</a>	Apr 5		Opinion letter to John A. Pelzer
<a href="#">56-82</a>	Mar 16	SENATE. FILING. CANDIDATES. REDISTRICTING. REAPPORTIONMENT.	Where state senatorial districts have not been established by reapportionment for one year next before the general election, under Article III, Section 6, Missouri Constitution, a candidate for the office of state senator must have resided for one year next before the day of election in some portion of any former district or districts from which the new district shall have been taken.
<a href="#">58-82</a>	Feb 25		Opinion letter to The Honorable James C. Kirkpatrick
<a href="#">59-82</a>	Apr 15		Opinion letter to The Honorable William Steinmetz
<a href="#">61-82</a>	Mar 25		Opinion letter to Dr. Arthur L. Mallory
<a href="#">62-82</a>	Mar 22	SPECIAL BUSINESS DISTRICT. CITIES, TOWNS AND VILLAGES.	A petition by property owners to establish a special business district under Section 71.794, RSMo, cannot limit the authority of the district to levy taxes pursuant to Section 71.800, RSMo, although the district is not required to levy such taxes.
<a href="#">63-82</a>	Mar 16		Opinion letter to Fred A. Lafser
<a href="#">63a-82</a>	Oct 28		Addendum to Opinion letter to Fred A. Lafser
<a href="#">65-82</a>	Apr 23	PROFESSIONAL CORPORATIONS. CORPORATIONS.	Persons engaged in professions or occupations other than those delineated in Section 356.020(2) may not form professional corporations under Chapter 356.
<a href="#">67-82</a>	Oct 28	SCHOOLS. SCHOOL AID. SCHOOL BOARDS. SCHOOL DISTRICTS	A school district which provides only an elementary school program is not authorized to begin a ninth grade for its resident ninth grade students, and such district is not entitled to state aid under Section 163.031, RSMo 1978, for the ninth grade students attending such unauthorized ninth grade program.
<a href="#">70-82</a>	June 7		Opinion letter to Dr. Arthur L. Mallory
<a href="#">72-82</a>	Nov 18	CHILD LABOR. LABOR AND INDUSTRIAL RELATIONS.	The federal Fair Labor Standards Act pre-empts the Missouri Child Labor Law, Chapter 294, RSMo, to the extent, if any, that the Missouri Child Labor Law is in conflict with the intent and policy of the federal Act. However, the Fair Labor Standards Act was not intended by Congress to prohibit state regulation of child labor by occupying the whole field in this area, but instead leaves the states free to enact laws either more restrictive to employers or more favorable to employees.

			The state is also free to regulate in any manner it deems proper any areas exempted from the coverage of the Fair Labor Standards Act, or any subject areas not falling within the Act's definition of "commerce".
<a href="#">73-82</a>	Nov 18	STATE AUDITOR. STATE COLLEGES. RULES AND REGULATIONS. AUDITING. AUDITS.	Southwest Missouri State University is not required to obtain the approval of the State Auditor prior to entering into a contract for audit services with a private accounting or auditing firm.
<a href="#">74-82</a>	June 21	INSURANCE. HEALTH INSURANCE. HEALTH BENEFITS. DIVISION OF INSURANCE. DEPARTMENT OF MENTAL HEALTH. HEALTH SERVICE CORPORATIONS.	Insurance companies and health services corporations issuing health insurance policies or contracts in this state are required to offer, as an optional coverage under such policies or contracts, benefits for residential and nonresidential treatment programs for alcoholism, chemical dependency and drug addiction.
77-82			Withdrawn
<a href="#">79-82</a>	Aug 9	SCHOOLS. SCHOOL FUNDS. TEACHERS FUND. SCHOOL DISTRICTS. SCHOOL BOARDS.	Moneys received from the Fair Share Fund pursuant to Senate Committee Substitute for House Committee Substitute for House Bills Nos. 1548 and 1543 should be placed to the credit of the teacher's fund as provided in Section 165.011, RSMo 1978. There is no requirement that the money received from the Fair Share Fund be spent for teachers' salaries in the fiscal year in which it was appropriated.
<a href="#">80-82</a>	July 30	APPORTIONMENT. REAPPORTIONMENT. SENATORIAL DISTRICTS. SENATORIAL REDISTRICTING. POLITICAL COMMITTEES. CONSTITUTIONAL LAW.	The senatorial districts defined by the Judicial Commission Senate Plan, filed November 16, 1981, are to be used in determining senatorial district committees for the purpose of selecting party state committee members.
<a href="#">81-82</a>	Aug 12	REDISTRICTING. WARDS-WARD LINES. COUNTY COMMITTEE. POLITICAL	The terms of office of incumbent members of the political party committees in the City of St. Louis are not affected by subsequent changes in ward boundary lines, and such persons continue to represent their wards as constituted at the time of their election.

		COMMITTEES.	
<a href="#">82-82</a>	Dec 30	PUBLIC SCHOOL RETIREMENT SYSTEM. SICK LEAVE PAYMENTS AND SICK LEAVE. RETIRED STATE EMPLOYEES.	The Public School Retirement System of Missouri is required under Section 104.601, RSMo Supp. 1902, to allow creditable service for unused sick leave in calculating retirement benefits for those members employed by agencies of the State of Missouri other than institutions of higher learning, but the provisions of that section do not apply to those members who are not employed by a state agency. In calculating the retirement benefits for such members, The Public School Retirement System of Missouri is required under Section 104.601 to include any creditable service for unused accumulated sick leave in addition to the creditable service for actual services, and the allowance of such unused sick leave credit may not be deferred to the period following the date of last services.
<a href="#">84-82</a>	Dec 21	STATE AUDITOR. DEPARTMENT OF REVENUE. CONFIDENTIAL RECORDS. CONFIDENTIAL INFORMATION.	The State Auditor does not have the right to inspect individual income, corporate income, and withholding tax returns, and other documents and information described in Section 32.057, filed with the Department of Revenue, unless the inspection of such documents is necessary to the proper performance of his constitutional duty to postaudit the accounts of the Department of Revenue or to the proper performance of his constitutional duty to establish appropriate accounting systems for the Department of Revenue.
<a href="#">85-82</a>	Nov 15	STATE EMPLOYEES' RETIREMENT SYSTEM. LEGISLATORS.	A member of the General Assembly is a member of the Missouri State Employees' Retirement System pursuant to the provisions of Sections 104.310(25) and 104.330.1, RSMo Supp. 1982. As such, a member of the General Assembly may serve as an elected member of the board of trustees of the Missouri State Employees' Retirement System pursuant to Section 104.450, RSMo 1978.
<a href="#">87-82</a>	Oct 18	LICENSES. PRIVATE WATCHMEN. PRIVATE POLICE. BOARD OF POLICE COMMISSIONERS. ST. LOUIS BOARD OF POLICE COMMISSIONERS.	The provisions of Sections 57.117 and 85.005 do not require that a person licensed as a watchman pursuant to Section 84.340 be a resident of the State of Missouri in order to qualify as a licensee.
<a href="#">88-82</a>	Aug 5		Opinion letter to The Honorable James C. Kirkpatrick
<a href="#">90-82</a>	Aug 17	COUNTY HOSPITALS. COUNTY COURT. GENERAL OBLIGATION BONDS. REVENUE BONDS.	The amendment of Section 205.190, RSMo Supp. 1981, by House Bill 1069, Second Regular Session, 81st General Assembly, which provides for the office of treasurer of the county hospital board of trustees, does not affect the duty of the county treasurer with respect to general obligation bonds issued under Section 205.160, RSMo, but

		BONDS.	does place the responsibility for funds received from the issuance of revenue bonds and for revenue collected for payment of principal and interest, under Section 205.161, RSMo Supp. 1981, in the treasurer of the county hospital board of trustees.
<a href="#">91-82</a>	Dec 2	STATE EMPLOYEES' RETIREMENT SYSTEM. RETIRED STATE EMPLOYEES. MEDICAL CARE PLAN.	Section 104.515.12, RSMo Supp. 1982 , provides that the state shall contribute \$1.50 per month to the Missouri State Medical Care Plan for each individual employed as a special consultant by the Board of Trustees of the Missouri State Employees' Retirement System.
<a href="#">92-82</a>	Aug 25		Opinion letter to The Honorable Leary G. Skinner
<a href="#">93-82</a>	Aug 25	CLAY COUNTY. COUNTY COMMITTEE. POLITICAL COMMITTEES. SENATORIAL DISTRICTS.	Representation of Clay County on the senatorial district committees for districts 12 and 17 is governed by Section 115.619.4, and the phrase “ward or township” as used in that section includes a “committee district” established in Clay County pursuant to Section 115.607.4.
<a href="#">95-82</a>	Sept 10		Opinion letter to Honorable James C. Kirkpatrick
<a href="#">96-82</a>	Nov 8	ARRESTS. CITIES, TOWNS AND VILLAGES. POLICE. POLICE RECORDS. SUNSHINE LAW. RECORDS	A municipality in a first class county having a charter form of government may transmit arrest records to the county law enforcement agency pursuant to Section 66.200, RSMo 1978, prior to the closing of such arrest records pursuant to the requirements of Sections 610.100 and 610.105, RSMo Supp. 1982 . A municipality in a first class county having a charter form of government may not transmit arrest records to the county law enforcement agency, if prior to the transmittal, the arrest record is closed as required by Sections 610.100 and 610.105, RSMo Supp. 1982.
<a href="#">97-82</a>	Dec 10	ELECTION EXPENSE. ELECTIONS. SECRETARY OF STATE. OFFICE OF ADMINISTRATION. COSTS OF ELECTIONS. COMMISSIONER OF ADMINISTRATION.	The Commissioner of Administration is responsible for the administration of the State Election Subsidy Fund, established pursuant to Section 115.077.5, RSMo Supp. 1982.
<a href="#">99-82</a>	Dec 20	COMMISSIONER OF ADMINISTRATION. OFFICE OF ADMINISTRATION. STATE EMPLOYEES'	State Travel Regulations, 1 CSR 10-11.010, do not apply to the employees of the Missouri State Employees' Retirement System.

		RETIREMENT SYSTEM.	
<a href="#">102-82</a>	Dec 20	FIRE PROTECTION DISTRICTS. HANCOCK AMENDMENT. TAXATION.	Upon consolidation of two existing fire protection districts pursuant to Section 321.460, RSMo 1978, the consolidated district may levy as a matter of right only those taxes which had been previously approved by the voters of both of the former fire protection districts prior to consolidation.
<a href="#">118-82</a>	Dec 20	CHIROPODIST. PODIATRIST. PHYSICIAN OF THE FOOT.	A chiropodist, podiatrist or physician of the foot, under Section 330.010.2, RSMo 1978, may perform surgical treatment of the ailments of the human foot when a general anesthetic has been administered by a person licensed to administer anesthetics.
<a href="#">122-82</a>	Dec 14	HANCOCK AMENDMENT. CONSTITUTIONAL LAW. COUNTIES.	County hospital charges may be increased without voter approval. Such charges do not constitute taxes, licenses or fees within the meaning of Article X, Section 22 (a) of the Missouri Constitution.
<a href="#">132-82</a>	Dec 21		Opinion letter to John A. Pelzer

*Attorney General of Missouri*

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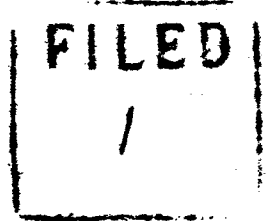
JOHN ASHCROFT  
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February 22, 1982

OPINION LETTER NO. 1

Paul R. Ahr, Ph.D., M.P.A.  
Director, Department of Mental Health  
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Dear Dr. Ahr:

This is in response to your questions:

1. Can the Revolving Fund established under Statute 31.060 for the various facilities, be used to pay employees who have earned their salary but, due to termination early in the pay cycle or clerical error, must wait an extended amount of time in order to receive their salary?

2. Can the Revolving Fund be used to pay expenses incurred by employees for travel other than for interstate compact?

Section 31.060, RSMo 1978, provides:

Upon a request from the director of the department of mental health or social services, as the case may be, the commissioner of administration shall draw a warrant payable to the business manager of each of the state hospitals, mental health centers, the state school and the state chest hospital, in an amount to be specified by the director of the department of mental health or social services, as the case may be, not to exceed, however, the sum of four thousand dollars for each such institution. The sum so specified shall be placed

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in the hands of the business manager as a revolving fund to be used in the payment of the incidental expenses of the institution for which he has been appointed, and the payment of costs incurred in returning nonresident patients to their state of residence. All expenditures shall be made in accordance with rules and regulations established by the commissioner of administration.

Our task in rendering this opinion is to seek the intent of the legislature. State ex rel. Ashcroft v. Union Electric Co., 559 S.W.2d 216 (Mo.App. 1977). We must determine that intent from the language employed by the General Assembly, giving the words used their plain, ordinary and usual meaning. City of Willow Springs v. Missouri State Librarian, 596 S.W.2d 441 (Mo. banc 1980).

Black's Law Dictionary (5th Ed. 1979) defines a revolving fund as:

[a] fund from which withdrawals are made . . . as disbursements, with the obligation of repaying the fund . . . to keep the fund intact. A fund whose amounts are continually expended and then replenished; for example, a petty cash fund. Id. at 1188.

Revolving funds granting state officials discretion to pay incidental expenses, among other things, are not uncommon in Missouri. See, for example, Section 219.016.9, RSMo 1978 (Youth Services) and Section 41.210, RSMo 1978 (Adjutant General).

Your questions require us to determine the propriety of certain payments from the revolving fund established in Section 31.060. The General Assembly has established specific procedures in Chapters 33 and 34 to be followed for the payment of state employee salaries and the purchase of state supplies. Because any use of the revolving fund necessarily involves some conflict with these provisions, or with regulations promulgated thereunder of the Office of Administration, we are obliged to harmonize these two statutes dealing with the same subject matter. Goldberg v. Administrative Hearing Commission, 609 S.W.2d 140, 144 (Mo. banc 1980).

Having provided a specific procedure for the payment of state employees' salaries and the purchase of supplies by state facilities, we do not believe the General Assembly intended that these procedures be circumvented except in extraordinary circumstances. By placing the revolving fund "in the hands of the business manager," the

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General Assembly gave him discretion in its administration. This discretion is channeled, however, by the statutory language which limits use of the revolving funds to "incidental expenses" and "costs incurred in returning nonresident patients to their state of residence."

Black's Law Dictionary (5th Ed. 1979) defines "incidental" as:

[d]epending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose . . . . Id. at 686.

The Compact Edition of the English Oxford Dictionary defines "incidental" as:

[o]curring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part; casual - of a charge or expense such as is incurred (in the execution of some plan or purpose) apart from the primary disbursements.

Finally, "incidental" is characterized in 42 C.J.S. Incidental, as:

[i]ncident to the main purpose of the main business; occasional; of minor importance; . . . happening as a chance or undesigned feature of something else; liable to happen or to follow as a chance feature or incident. Id. at 520-21.

Reading Section 31.060, in light of these definitions and in harmony with Chapters 33 and 34, we believe the revolving fund was designed to permit payments that are occasional, casual, minor, and immediately necessary for the proper operation of the facility. We conclude, therefore, that the mere passage of time and the resultant "inconvenience" to a state employee or former employee would not constitute a proper basis for payment from the revolving fund. While such a payment would be in the best interests of the employee or former employee, we do not believe it would be immediately necessary for the proper operation of the facility in all cases.

Specifically, we believe payment to terminated employees from the revolving fund prior to the expiration of the annual pay cycle is an improper use of the fund. Such a payment is neither incidental nor is it in behalf of the institution.

Paul R. Ahr., Ph.D., M.P.A.

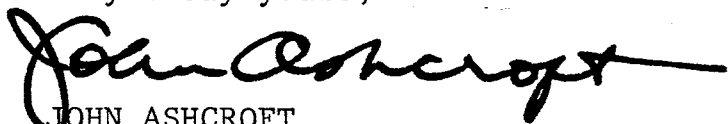
Use of the fund to pay employees who have earned their salary but whose pay checks contain errors in payment may be a proper exercise of a business manager's discretionary use of the fund in very limited circumstances. However, we do not intend to authorize wholesale use of the revolving fund to correct administrative errors in salary payment in this opinion; neither do we intend herein to establish guidelines within which a business manager must exercise his discretion. Section 31.060 is clear. The fund may be used when the business manager, in his discretion, believes he is paying an incidental expense of the institution. Thus, we believe any such expenditure must be in the best interests of the institution without regard to any benefit or burden which will inure to an employee as a result of payment or nonpayment. Further, the exercise of such discretion by the business manager must be tempered with the realization that the business manager bears responsibility for the uses and maintenance of the fund.

As to your second question, Section 33.090, RSMo 1978, expresses the legislative intent with regard to the payment of travel expenses incurred by employees on behalf of the state. In accordance with Section 33.090, the commissioner of administration has promulgated rules and regulations governing travel by state employees and reimbursement of travel expenses incurred by such employees. See 1 CSR 10-11.010. We do not believe the legislature intended to allow the use of the revolving fund to circumvent these rules and regulations.

We believe that travel expenses may not generally be prepaid by or reimbursed from the revolving fund; the provisions of 1 CSR 10-11.010 control with regard to payment of travel expenses incurred by state employees on behalf of the state. Section 31.060 expressly allows "payment of costs incurred in returning nonresident patients to their state of residence . . ." from the revolving fund. This authority to use the revolving fund requires only that travel be to return nonresident patients; we find no requirement that travel expenses payable from the fund be related solely to interstate compact.

We add this caveat: Every payment from the revolving fund must be reimburseable by moneys appropriated by the General Assembly. We do not authorize payments from the revolving fund for items or services outside an agency's lawful scope of activity or lawfully appropriated funds. See Section 33.170, RSMo 1978, Article III, Section 36 and Article IV, Section 28, Missouri Constitution (1945).

Very truly yours,



JOHN ASHCROFT  
Attorney General

DRUGS:  
MEDICINE:  
PRESCRIPTIONS:  
PRACTICE OF MEDICINE:  
PHYSICIANS AND SURGEONS:  
PHARMACISTS:  
ANTITRUST:

A physician who requires that his patient accept drugs dispensed by the physician and refuses to provide the patient a prescription for such drugs which can be filled at a pharmacy of the patient's choice may be in violation of the Missouri Antitrust Law and Section 334.100.2(5),

RSMo Supp. 1981; a physician who instructs or requires a patient to use a pharmacy in which the physician has a financial interest to fill a drug prescription may be in violation of the Missouri Antitrust Law and Section 334.100.2(5), RSMo Supp. 1981; a physician may not delegate to any person other than a licensed physician or pharmacist the preparation or dispensing of a prescription drug, but may allow an unlicensed person to prepare and affix, under his supervision, the label for such prescription; and a physician may not prescribe a drug by its brand or trade name and then dispense a therapeutically equivalent generic drug in a container labeled with the brand or trade name.

July 8, 1982

OPINION NO. 6

Joseph H. Frappier, Director  
Department of Consumer Affairs,  
Regulation and Licensing  
Post Office Box 1157  
Jefferson City, Missouri 65102



Dear Mr. Frappier:

This is in response to your request for an opinion as follows:

- A. May a physician require, as a condition of the physician/patient relationship, that the patient receive only drugs dispensed directly from the physician's office?
- B. May a physician give a written or telephone prescription to a patient, but limit the patient to having the prescription filled only at a particular pharmacy in which the physician has a financial interest, or from which he receives financial benefit. This limitation of choice

Joseph H. Frappier, Director

of pharmacy is by explicit instruction, or by the physician's refusal to call in or authorize the prescription at another pharmacy?

- C. May a physician's unlicensed office attendant, or a pharmacist directly employed by the physician, prepare and label medications for patients and dispense the medications to the patients upon the instruction of the physician?
- D. May a physician label the medication dispensed by him to his patients with a recognized brand-name, when in fact he is dispensing a generic equivalent of the brand-name drug?

A.

#### NONOPTIONAL PHYSICIAN DISPENSING

We find no provision of Missouri law which either expressly permits or expressly prohibits the practice described in your first question. However, a physician who requires, as a condition of the physician-patient relationship, that the patient accept only drugs dispensed directly from the physician's office, and refuses to provide a prescription which may be filled at a pharmacy, arguably is in violation of the Missouri Antitrust Law, Chapter 416, RSMo 1978.

Section 416.031 provides in relevant part:

- 1. Every contract, combination or conspiracy in restraint of trade or commerce in this state is unlawful.
- 2. It is unlawful to monopolize, attempt to monopolize, or conspire to monopolize trade or commerce in this state.

As used in the Missouri Antitrust Law, the phrase "trade or commerce" means any economic activity involving or relating to any commodity or service, Section 416.021(4), and "service" means any kind of activity performed in whole or in part for financial gain, Section 416.021(3).

Joseph H. Frappier, Director

Section 416.141 states: "[The Missouri Antitrust Law] shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes."

Such "comparable federal antitrust statutes" are found in the Sherman Antitrust Act, 15 U.S.C.A. §§1-7, which provides in relevant part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal. . . .  
[15 U.S.C.A. §1]

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, . . . shall be deemed guilty of a felony, . . . [15 U.S.C.A. §2]

The federal judicial interpretations of the Sherman Act, 15 U.S.C.A. §§1-7, include prohibitions against tying arrangements. In Northern Pacific Railway Company v. United States, 356 U.S. 1 (1958), the United States Supreme Court stated:

[A] tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed, "tying agreements serve hardly any purpose beyond the suppression of competition." . . . They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons "tying agreements fare harshly under the laws forbidding restraints of trade." . . . They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the

Joseph H. Frappier, Director

market for the tied product and a "not insubstantial" amount of interstate commerce is affected. . . . Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant. . . . [356 U.S. at 5-6]

Services, as well as tangible items or commodities, can be the "tying product." Cantor v. Detroit Edison Company, 428 U.S. 579 (1976). Professional services in particular are "trade or commerce" for purposes of the antitrust law. National Society of Professional Engineers v. United States, 435 U.S. 679 (1978). See, also, Section 416.021(3) and (4).

We believe that the professional services of a physician (diagnosis of an abnormality and formulation of treatment regimen) and the drugs which the physician determines should be self-administered by the patient as a part of the therapy can be considered separate "products" in the sense of the antitrust law. We also believe that through the "product" of professional services a physician could very well exercise economic power over an appreciable number of buyers (i.e., patients) of the separate product (i.e., prescription drugs) sufficient to constitute an unreasonable restraint of trade in the sale of these pharmaceutical products.

Moreover, nonoptional physician dispensing of prescription drugs would appear to be proscribed by Opinion 8.06 published in Current Opinions of the Judicial Council of the American Medical Association--1982, which states in relevant part:

Patients are entitled to the same freedom of choice in selecting who will fill their prescription needs as they are in the choice of a physician. (See 9.05). The prescription is a written direction for a therapeutic or corrective agent. A patient is entitled to a copy of the physician's prescription for drugs, eyeglasses, contact lenses, or other devices as required by the Principles of Medical Ethics and as required by law. The patient has the right to have the prescription filled wherever the patient wishes.

Therefore, we believe that nonoptional physician dispensing of prescription drugs may in appropriate circumstances be deemed "misconduct" for which disciplinary proceedings may be instituted

Joseph H. Frappier, Director

against such physician by the State Board of Registration for the Healing Arts pursuant to Section 334.100.2(5), RSMo Supp. 1981.

B.

#### PHYSICIAN SELECTED PHARMACY

A physician who is motivated to direct or influence a patient to have a drug prescription filled at a pharmacy for his own gain engages in conduct substantially equivalent to that discussed in answer to your first question. In our view, the same potentiality for application of the Missouri Antitrust Law exists.

Such practice would also appear to be proscribed by Opinion 8.06 of the Judicial Council of the American Medical Association, which contains these provisions:

A physician may own or operate a pharmacy if there is no resulting exploitation of patients.

\* \* \*

Physicians should not discourage patients from requesting a written prescription or urge them to fill prescriptions at an establishment which has a direct telephone line or which has entered into a business or other preferential arrangement with the physician with respect to the filling of the physician's prescription.

If a physician may personally profit from a patient's use of a particular pharmacy for the filling of a prescription and if the physician controls the selection of this pharmacy in some manner, we believe the State Board of Registration for the Healing Arts could regard this as proscribed conduct for purposes of invoking the disciplinary sanctions of Section 334.100.2.

C.

#### PHYSICIAN DELEGATION OF DISPENSING FUNCTION

The subject of permissible and impermissible delegation by a physician of the preparation, labeling and dispensing of prescription drugs was addressed in our recent Opinion No. 44, issued May

Joseph H. Frappier, Director

24, 1982, a copy of which is enclosed. Therein we concluded that a physician may not delegate either the preparation or dispensing of prescription drugs to a person not licensed as a pharmacist or as a physician, but may allow an unlicensed person to prepare and affix, under his supervision, the label required by law on a prescription he dispenses in accordance with the provisions of Section 338.059, RSMo 1978.

D.

#### LABELING OF DISPENSED DRUG CONTAINER

We believe that a physician dispensing a generic equivalent drug to his patient in a container bearing a label indicating that the drug is a trade or brand name drug is in violation of Section 338.059, RSMo 1978, which provides in part:

1. It shall be the duty of a licensed pharmacist or a physician to affix or have affixed by someone under his supervision a label to each and every container in which is placed any prescription drug upon which is typed or written the following information:

\* \* \*

(7) The exact name and dosage of the drug dispensed;

\* \* \*

(9) When a generic substitution is dispensed, [in accordance with Section 338.056] the name of the manufacturer or an abbreviation thereof shall appear on the label. . . . [Emphasis added].

We do not think that the "exact name" of a therapeutically equivalent generic drug (e.g., chlordiazepoxide) is the same as, or can be interchanged with, that of its trade or brand name counterpart (e.g., Librium). Also, we think that when a physician prescribes a trade or brand name drug, and then dispenses a drug based on this prescription, he may not substitute a "therapeutically equivalent generic drug" (Section 338.056, RSMo 1978) without indicating on the container label the name, or abbreviation of the name, of the manufacturer of the substituted drug.

Joseph H. Frappier, Director

### CONCLUSION

It is the opinion of this office that:

(1) A physician who requires that his patient accept drugs dispensed by the physician and refuses to provide the patient a prescription for such drugs which can be filled at a pharmacy of the patient's choice may be in violation of the Missouri Antitrust Law and Section 334.100.2(5), RSMo Supp. 1981.

(2) A physician who instructs or requires a patient to use a pharmacy in which the physician has a financial interest to fill a drug prescription may be in violation of the Missouri Antitrust Law and Section 334.100.2(5), RSMo Supp. 1981.

(3) A physician may not delegate to any person other than a licensed physician or pharmacist the preparation or dispensing of a prescription drug, but may allow an unlicensed person to prepare and affix, under his supervision, the label for such prescription.

(4) A physician may not prescribe a drug by its brand or trade name and then dispense a therapeutically equivalent generic drug in a container labeled with the brand or trade name.

Very truly yours,



JOHN ASHCROFT  
Attorney General

Enclosure: Opinion No. 44 (1982)

STATE EMPLOYEES' RETIREMENT SYSTEM:  
INVESTMENT OF STATE RETIREMENT SYSTEM FUNDS:

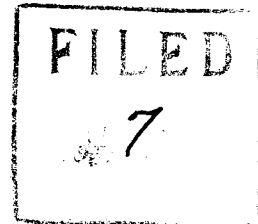
The Board of  
Trustees of the  
Missouri State

Employees' Retirement System may invest the funds of the system in the common stock of any corporation organized under the laws of the United States, or of any state, which has a good earnings growth but elects not to pay a cash dividend, subject to the limitations in Section 379.080.1, RSMo Supp. 1981, on the amount of stock purchased, which are enumerated in the body of this opinion. The Board of Trustees of the Missouri State Employees' Retirement System may also invest in the common stock of any solvent corporation organized under the laws of any territory or possession of the United States, or of the District of Columbia, or of Canada or any Canadian province, subject to the requirements expressed in Section 376.305, RSMo 1978, which are also enumerated in the body of this opinion. Both of the above permissible investments are subject to the prudent man rule regarding investments by trustees as expressed in Missouri court decisions.

January 14, 1982

OPINION NO. 7

Ms. Mary-Jean Hackwood  
Executive Secretary  
Missouri State Employees' Retirement System  
900 Leslie  
Jefferson City, MO 65101



Dear Ms. Hackwood:

This is in reply to your predecessor's request for an official opinion of this office, which request reads as follows:

May the Board of Trustees of the Missouri State Employees' Retirement System authorize investments in common stocks which have good earnings growth but which elect to not pay a cash dividend, and/or in common stocks of foreign companies.

We understand the term "foreign companies" as used in your request to mean corporations other than corporations organized under the laws of the United States, any state, territory or possession of the United States, or the District of Columbia.

Ms. Mary-Jean Hackwood

Sections 104.310 through 104.620, RSMo, are the statutes that pertain to the Missouri State Employees' Retirement System. Section 104.440.3, RSMo Supp. 1981, provides:

So far as practicable, the funds and property of the system shall be kept safely invested so as to earn a reasonable return. The board may invest the funds of the system as permitted by laws of Missouri relating to the investment of the capital, reserve, and surplus funds of life insurance companies or casualty insurance companies organized under the laws of Missouri.

This statute authorizes the board of trustees to invest the funds of the retirement system in the same manner as life insurance companies or casualty insurance companies may invest their capital, reserve and surplus funds. The plain meaning of the statute is that investments meeting the requirements contained in the statutes relating to investments by either life insurance companies or casualty insurance companies are permissible investments for the funds of the state retirement system.

Section 376.305, RSMo 1978, applicable to life insurance companies, provides:

1. In addition to the investments permitted by section 376.300, the capital, reserve and surplus of all life insurance companies of whatever kind and character organized or doing business under sections 376.010 to 376.670, may be invested in the common stock of any solvent corporation, organized under the laws of the United States, any state, territory or possession of the United States, or the District of Columbia, or of the Dominion of Canada, or any province of the Dominion of Canada, provided the corporation's net worth as shown on its balance sheet at the end of the last fiscal year preceding purchase shall have been at least ten million dollars and cash dividends shall have been earned and paid on its common stock in each of the three fiscal years preceding such acquisition; provided further that all prior obligations or preference stocks of such corporation, if any, are eligible for investment under any of the provisions of section 376.300, and that such common stocks are registered on a national securities

exchange or quoted in established over-the-counter markets, or provided that such corporation is registered and operated as an open-end regulated investment company in accordance with the Investment Company Act of 1940, as amended. Common stocks meeting the preceding qualifications shall be eligible for deposit, as provided under section 376.170.

2. No such life insurance company shall invest in excess of ten percent of its admitted assets or an amount in excess of its combined capital and surplus, whichever is the lesser, as shown by its last annual statement preceding the date of acquisition, as filed with the director of the insurance division of the state of Missouri, in the total amount of such common stocks, nor shall such life insurance company own securities described in subdivision (7) of subsection 1 of section 376.300, and subsection 1 of this section, which, in the aggregate, represent more than five percent of the total of all outstanding shares of stock of the issuing corporation, nor shall any such life insurance company own common stock described in subsection 1 issued by any one corporation which represents more than two percent of the admitted assets of such life insurance company.

This statute authorizes life insurance companies to invest in the common stock of any solvent corporation organized under the laws of the United States or any state, territory or possession of the United States, or the District of Columbia, or of Canada or any Canadian province, subject to certain other specified requirements. One of the requirements is that cash dividends shall have been earned and paid on the common stock in each of the three fiscal years preceding the acquisition of the stock.

Section 379.080.1, RSMo Supp. 1981, applicable to casualty insurance companies, provides, in pertinent part:

The remainder of the capital of these companies and their other assets may be invested . . . in stocks . . . issued by corporations organized under the laws of

Ms. Mary-Jean Hackwood

this state, or of the United States, or of any other state. . . . No insurance company subject to this subsection may buy stock in any company to an amount which will give the company so buying the virtual control of any other corporation, but any corporation organized under or for the purpose of doing any of the kinds of business mentioned in any one of the subdivisions of subsection 1 of section 379.010 may buy and hold any amount of stock in other corporations organized under or for the purpose of doing any of the kinds of business mentioned in any one of the subdivisions of subsection 1 of said section 379.010, but . . . no such company shall invest more than thirty-five percent of the surplus to policyholders of such acquiring company, or fifty percent of its surplus over and above its liabilities and capital, whichever is greater, in the stocks or bonds of any other such corporation.

This statute authorizes casualty insurance companies to invest in the stock of corporations organized under the laws of the United States or any state in this country. However, this statute makes no requirement concerning the payment of cash dividends prior to or after investment, nor does it allow investments in corporations other than corporations organized under the laws of the state of Missouri, or of the United States, or of any other state.

Our Opinion No. 39, 1961, to Hemphill, held that the Board of Trustees of the State Retirement System may invest the funds of the system in common stock of any corporation organized under the laws of the United States, or of any state, subject to the prudent man rule regarding investments by trustees as expressed in Missouri court decisions. The opinion noted that statutory restrictions that qualify investments in common stock in corporations organized under the laws of the United States, any state, territory or possession of the United States, or the District of Columbia are found only in regard to life insurance companies. The opinion then held that since both life insurance companies and casualty insurance companies are authorized to invest in common stock, the common stock of any corporation organized under the laws of the United States or of any state is a permissible investment for state retirement system funds. An investment of state retirement system funds must meet the requirements of only one insurance

Ms. Mary-Jean Hackwood

law, either the life insurance statute or the casualty insurance statute. This same reasoning will be applied to the questions presented here.

Although both life insurance companies and casualty insurance companies are authorized to invest in the common stock of corporations organized under the laws of the United States or of any state, statutory restrictions qualifying the permissible common stock investments for life insurance companies differ from those relating to casualty insurance companies. Since it is only necessary that state retirement system investments meet the requirements for investments by casualty insurance companies, the Board of Trustees of the state retirement system may invest the funds of the system in common stocks of corporations organized under the laws of the United States, or of any state, which have good earnings growth but which elect to not pay a cash dividend, subject to the limitations of Section 379.080.1 on the amount of stock purchased, which are: the retirement system may not buy stock in any company to an amount which will give the retirement system the virtual control of any corporation; but the retirement system may buy and hold any amount of stock in corporations organized under or for the purpose of doing any of the kinds of business mentioned in any one of the subdivisions of Section 379.010.1 (insurance corporations), but the retirement system shall not invest more than 35% of the surplus to policyholders, or 50% of its surplus over and above its liabilities and capital, whichever is greater, in the stocks or bonds of any such insurance corporation.

However, only life insurance companies are authorized to invest in the common stock of solvent corporations organized under the laws of any territory or possession of the United States, or of the District of Columbia, or of the Dominion of Canada or any province of the Dominion of Canada, with the additional restrictions provided in Section 376.305, above. Casualty insurance companies are not authorized to invest in the common stock of Canadian corporations, or corporations organized under the laws of any territory or possession of the United States or of the District of Columbia under Section 379.080.1, above. But under the reasoning of Opinion No. 39, 1961, permissible investments for the state retirement system must meet the requirements of either the laws relating to investments by life insurance companies or the laws relating to investments by casualty insurance companies, but not both. Therefore, investments in the common stock of solvent corporations organized under the laws of any territory or possession of the United States, or of the District of Columbia, or of Canada or any Canadian province are permissible investments

of funds of the Missouri State Employees' Retirement System, provided that such investments meet all the other requirements contained in Section 376.305, which are: the corporation's net worth as shown on its balance sheet at the end of the last fiscal year preceding purchase shall have been at least ten million dollars and cash dividends shall have been earned and paid on its common stock in each of the three fiscal years preceding such acquisition; all prior obligations or preference stocks of such corporation, if any, are eligible for investment under any of the provisions of Section 376.300; such common stocks are registered on a national securities exchange or quoted in established over-the-counter markets, or such corporation is registered and operated as an open-end regulated investment company in accordance with the Investment Company Act of 1940, as amended; the retirement system shall not invest in excess of 10% of its admitted assets or an amount in excess of its combined capital and surplus, whichever is the lesser, as shown by its last annual statement preceding the date of acquisition, in the total amount of such common stock; the retirement system shall not own securities described in Section 376.300.1(7) and Section 376.305.1, which, in the aggregate, represent more than 5% of the total of all outstanding shares of stock of the issuing corporation; and the retirement system shall not own common stock described in Section 376.305.1 issued by any one corporation which represents more than 2% of the admitted assets of the retirement system.

It should be noted that all investments by the Board of Trustees of the Missouri State Employees' Retirement System are subject to the prudent man rule regarding investments by trustees as expressed in Missouri court decisions. Opinion No. 39, 1961, at page 5, and Opinion No. 92, 1980, to Bierdeman-Fike, at page 17, both held that the members of the Board of Trustees of the Missouri State Employees' Retirement System, in administering and investing the funds of the system, are bound by the general law respecting trusts and trustees. The discussion of the prudent man rule contained in these two opinions should be considered by the board when making any investment decisions.

While the prudent man rule is an important part of the general law respecting trusts and trustees, it is not the whole body of law. While a trustee must have the preservation of the estate and the amount and regularity of the income in view when investing trust funds, he is also required to diversify the investments. Thus, investment in the common stock of a corporation which in the opinion of the board, has a good earnings

Ms. Mary-Jean Hackwood

growth but which elects not to pay a cash dividend is not prohibited per se by the law of trusts. Investment in a limited amount of such stock may be a prudent decision reflecting sound business judgment.

#### CONCLUSION

It is the opinion of this office that the Board of Trustees of the Missouri State Employees' Retirement System may invest the funds of the system in the common stock of any corporation organized under the laws of the United States, or of any state, which has a good earnings growth but elects not to pay a cash dividend, subject to the limitations in Section 379.080.1, RSMo Supp. 1981, on the amount of stock purchased, which are enumerated in the body of this opinion. The Board of Trustees of the Missouri State Employees' Retirement System may also invest in the common stock of any solvent corporation organized under the laws of any territory or possession of the United States, or of the District of Columbia, or of Canada or any Canadian province, subject to the requirements expressed in Section 376.305, RSMo 1978, which are also enumerated in the body of this opinion. Both of the above permissible investments are subject to the prudent man rule regarding investments by trustees as expressed in Missouri court decisions.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Patricia Perkins.

Very truly yours,



JOHN ASHCROFT  
Attorney General

Enclosures: Op. No. 39  
Hemphill, 11-28-61

Op. No. 92  
Bierdeman-Fike, 3-7-80

*Attorney General of Missouri*

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JEFFERSON CITY, MISSOURI 65102

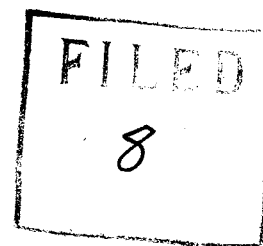
JOHN ASHCROFT  
ATTORNEY GENERAL

(314) 751-3321

January 26, 1982

OPINION LETTER NO. 8

Mary-Jean Hackwood  
Executive Secretary  
Missouri State Employees' Retirement System  
Post Office Box 209  
Jefferson City, Missouri 65102



Dear Ms. Hackwood:

This opinion is in response to a request by your predecessor, Al F. Holmes, Jr., which reads as follows:

Can the Board of Trustees of the Missouri State Employees' Retirement System make a lump sum payment to former court reporters who, by court order, were admitted to membership in the Retirement System in 1974 and were afforded immediate retirement benefits retroactive to a date of retirement which was prior to September 1, 1972? The total of retroactive retirement benefits was diminished by the contributions the reporter would have made had he been a member during his employment.

In Hawkins v. Missouri State Employees' Retirement System, 487 S.W.2d 580 (Mo.App. 1972), it was held that court reporters were entitled to participate in the Missouri State Employees' Retirement System and were entitled to receive prior membership credit. Thereafter, in State ex rel. Utrup v. Missouri State Employees' Retirement System, No. 26414, Circuit Court of Cole County, a suit was brought by court reporters who retired before the decision in Hawkins became final seeking retroactive retirement benefits. The circuit court ruled in favor of the court reporters and no appeal was taken.

Mary-Jean Hackwood

Prior to September 1, 1972, members of the retirement system were required to contribute a portion of their compensation to the retirement fund. In 1972 the legislature enacted Section 104.372, RSMo 1978, which made the retirement fund non-contributory after August 31, 1972, with exceptions not relevant here, and further provided that a member retiring after August 31, 1972, would be entitled to receive payment of an amount equal to his accumulated contributions and credited interest to the date of his retirement. However, no provision for refund was made for members who retired before September 1, 1972.

Therefore, when calculating the retroactive benefits payable to court reporters who retired before September 1, 1972, to comply with the decision in Utrup, the retirement board deducted therefrom an amount equal to the contributions that the court reporters would have paid had they been allowed to participate in the retirement system prior to their retirement.

In 1979 the General Assembly enacted Section 104.373 (Laws of Missouri, 1979, p. 289), which was recently repealed and reenacted, with minor changes, as Section 104.367, RSMo Supp. 1981, effective May 12, 1981. Subsection 1 of Section 104.367 states in relevant part:

Any member who is receiving retirement benefits on or after September 1, 1979, and who has not received a lump sum payment equal to the sum total of the contributions that member paid into the retirement system, plus the interest credited, to the member's account, during the member's years of employment, shall receive, upon application to the board as provided in this section, a lump sum payment of such amount, plus four and one-half percent per annum interest on such sum from the date of retirement to the date of such payment. . . .  
[emphasis added.]

Pension provisions are to be liberally construed in favor of the member. Williams v. Board of Trustees of Public School Retirement System of Missouri, 500 S.W.2d 31, 34 (Mo.App. 1973). Applying the rationale in Hawkins, we believe that contributions which were deducted when calculating the retroactive benefits payable to court reporters who retired prior to September 1, 1972, pursuant to the judgment in Utrup, would be deemed as constructively "paid into the retirement system . . . during the member's years of employment" within the meaning of Section 104.367.1.

Mary-Jean Hackwood

Therefore, it is our opinion that a former court reporter who retired before September 1, 1972, and whose retroactive retirement benefits were reduced by the amount of contributions he would have paid into the system during his years of employment, is entitled to receive a lump sum payment equal to the amount of such deduction upon application made pursuant to Section 104.367, RSMo Supp. 1981.

Very truly yours,

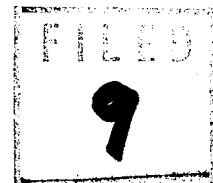
A handwritten signature in cursive script, reading "John Ashcroft".

JOHN ASHCROFT  
Attorney General

BIDS: Pursuant to Section 67.150, RSMo Supp.  
CONTRACTS: 1981, and with specific reference to  
INSURANCE: the types of insurance authorized by  
SCHOOLS: that section: All renewals of pre-  
sently existing insurance contracts  
of political subdivisions must be competitively bid. A political  
subdivision need not rebid its insurance contracts annually; a  
political subdivision may not enter into a contract that would  
create an indebtedness in excess of the revenue and income for the  
current year plus any unencumbered balances from previous years.  
Any proposed material modification of an insurance contract requires  
that the contract be rebid. A political subdivision may accept only  
those bids which meet the specifications established by the political  
subdivision. The determination of the "lowest and best" bid properly  
lies within the discretion of the authorities of the political sub-  
division.

October 12, 1982

OPINION NO. 9  
(CORRECTED)



The Honorable Roger B. Wilson  
State Senator, 19th District  
State Capitol Building  
Jefferson City, Missouri 65101

Dear Senator Wilson:

This is in reply to your request for an official opinion of  
this office concerning the following questions:

During the Second Regular Session of the  
80th General Assembly, the Legislature passed  
HB 1441 authorizing the governing body of any  
political subdivision to provide certain insur-  
ance benefits for employees. The bill also  
required that contracts for such insurance be  
purchased only after competitive bidding and  
be awarded to "the lowest and best bidder."

Attorney General John C. Danforth, in  
Opinion 275-1973, previously offered some  
guidelines for subdivisions purchasing insur-  
ance under competitive bidding. In view of  
this new legislation, should these guidelines  
be revised or broadened? I would also like  
the following questions answered, either in  
the general guidelines or in specific items:

1. Does the competitive bidding require-  
ment apply to the renewal of presently existing

The Honorable Roger B. Wilson

insurance contracts? To all future renewals of any contracts?

2. Must insurance contracts be bid on an annual basis? If not, is there a limit to how long they can run without rebidding?

3. Does an insurance contract have to be rebid whenever there is a rate change or a policy benefit change?

4. In evaluating bids to determine the "lowest and best," how does a subdivision evaluate "lowest" when bids are not identical? Can a subdivision accept only bids which meet exact specifications or is it free to accept one which deviates from specifications? What items can be considered, and how much weight can be given to those items, under the term "best?" Can a subdivision consider employer needs only or must they consider employee needs in evaluating best?

Because your questions relate specifically to Section 67.150, RSMo Supp. 1981, this opinion is intended to apply only to insurance contracts authorized by the statutory provision. This opinion is not intended to apply to forms of insurance, the purchase of which is not expressly authorized by Section 67.150. The word "insurance" as used herein, is limited to insurance which underwrites a plan to "furnish all or part of hospitalization or medical expenses, life insurance or similar benefits for [a political] subdivision's employees."

House Bill 1441, passed by the Second Regular Session of the 80th General Assembly and enacted as Section 67.150, RSMo Supp. 1981, provides as follows:

1. The governing body of any political subdivision may utilize the revenues and other available funds of the subdivision, as a part of the compensation of the employees of the subdivision, to contribute to the cost of a plan, including a plan underwritten by insurance, for furnishing all or part of hospitalization or medical expenses, life insurance or similar benefits for the subdivision's employees.

2. No contract shall be entered into by the governing body of the political subdivision to purchase any insurance policy or policies pursuant to the terms of this section unless

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the contract is submitted to competitive bidding and the contract is awarded to the lowest and best bidder.

Your first but unnumbered question concerns a document designated Opinion No. 275 (1973) to school boards within the State of Missouri. Although given an opinion number, this document contains advisory guidelines addressed to school boards in an effort to assist them in avoiding anticompetitive practices in the awarding of insurance contracts. We believe the assessment of Missouri antitrust law contained in the advisory guidelines is still valid. In fact, the guidelines' purpose, to assist school boards in avoiding violations of state and federal antitrust laws, is still important; we do not believe they are in need of any revision or broadening as a result of the enactment of Section 67.150.

Your first numbered question asks whether the competitive bidding requirement of Section 67.150 applies to the renewal of presently existing insurance contracts. By its very definition, the word "renewal" means the giving or receiving of an extension beyond an original termination date. Webster's New World Dictionary, Second College Edition, 1980. This understanding of what it means to renew a contract has found acceptance in Missouri appellate decisions which have addressed the question. In Rice v. Provident Life & Accident Ins. Co., 102 S.W.2d 147 (Mo.App. 1937), the court stated:

[T]he renewal of an insurance policy constitutes a separate and distinct contract for the period of time covered by the renewal,  
... Id. at 151.

See also, Matter of Supreme Meat Co., 73 F.R.D. 295 (E.D. Mo. 1976).

We believe that the renewal of an existing contract constitutes a separate and distinct contract for purposes of Section 67.150. If this were not the case, a political subdivision could ignore the clear requirements of Section 67.150 by simply renewing its existing contracts without bid. Thus, all renewals of presently existing insurance contracts and all future renewals of insurance contracts of political subdivisions are subject to the competitive bidding requirements of Section 67.150.

Regarding your second numbered question, there is no express provision in Section 67.150 which requires the bidding of insurance contracts of political subdivisions, on an annual basis, nor is there any impermissible length for an insurance contract expressed. However, Article VI, Section 26(a), Missouri Constitution (1945) provides:

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No county, city, incorporated town or village, school district or political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this constitution.

Article VI, Section 26(a) has been held to prohibit a political subdivision from anticipating future revenues (See, Ebert v. Jackson 70 S.W.2d 918 (Mo. 1934)). Under this constitutional provision, a contract for insurance for a political subdivision that creates an indebtedness exceeding the revenue and income for the year in which the contract was executed plus any unencumbered balance on hand from previous years is prohibited under Article VI, Section 26(a). See also Opinion No. 304 (1965) and Opinion No. 88 (1974), for discussions of long-term contracts by political subdivisions.

Your third numbered question asks whether an insurance contract must be rebid whenever there is a rate change or a policy benefit change. Insurance is a matter of contract and is governed by the principles of law applicable to contracts. Galemore v. Haley, 471 S.W.2d 518, 523 (Mo.App. 1971). Under contract principles, modification of a material element of a contract results in a new contract. Barr v. Snyder, 294 S.W.2d 4 (Mo. 1956). Section 67.150 requires that a new bidding procedure take place when any increase in rates and/or material reduction in policy benefits is contemplated.

The first part of your fourth numbered question asks how a political subdivision can assess bids which are not identical. We believe Section 67.150 is intended to remove elements of favoritism and fraud in the awarding of public employee insurance contracts. In order to remove the potential for bids which are not similar, we believe a political subdivision must establish specifications upon which bids will be accepted. The purpose of specifications is to provide a common standard upon which bids can be based and fairly compared. A bid which deviates substantially from specifications is tantamount to a counter proposal, invites favoritism and detracts from real competition. 64 Am.Jur.2d, Public Works and Contracts, Section 66 (1969).

We acknowledge that insurance companies offer a wide variety of benefit packages. However, we believe that officers of a political subdivision must establish specifications which define the minimum policy benefits and coverage acceptable when advertising for bids for insurance contracts. We further believe that no bid

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should be accepted which deviates substantially from these established minimums. In this way, each bid will adhere to a standard against which other bids can be compared for purposes of determining the lowest bidder.

The remainder of your fourth question deals with evaluating bids to determine the "lowest and best." Our Opinion No. 28 (1941) should be referred to for guidance on this subject, as well as the case of Missouri Service Co. v. City of Stanberry, 341 Mo. 500, 108 S.W.2d 25, 33 (1937), which stated:

The expression "lowest bidder" is used in its logical and practical, rather than in its grammatical sense. . . . "The general rule as deduced from the cases is that, in awarding contracts of this nature, public authorities are vested with discretion in determining who is the lowest and best bidder, and their discretion will not be interfered with by the courts, even if erroneous, provided it is based on a sound and reasonable discretion founded on facts and exercised in good faith, in the interest of the public, without collusion or fraud, nor corruptly, nor from motives of personal favoritism or ill will, and not abused." State ex rel. Dreyer, 183 Mo.App. 463, 486, 167 S.W. 1123, 1129, quoting footnote of 38 L.R.A. (N.S. 655).

With regard to the letting of contracts for public work, State v. Dreyer, 167 S.W. 1123 (Mo.App. 1914), overruled on other grounds by State ex rel. Johnson v. Sevier, 339 Mo. 483, 98 S.W.2d 677 (banc 1936), quoted with approval from Cyclopaedia of Law and Procedure:

Where the right to reject all bids is expressly reserved, or where the proposal is to the "lowest and best bidder," the "lowest responsible bidder," or other similar qualification is employed, the award of the contract within the discretion of the municipal authorities may be made bona fide to another bidder than the lowest, and the lowest bidder will have no right to demand the award to him; . . . but, under all circumstances, the lowest bidder has the right to fair consideration and treatment; and an award of the contract to another

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by corruption, by collusion, or for any other than legal and just considerations will be voidable at his option. See 28 Cyc. 663, 664. Id. at 1128.

In evaluating which bid is the lowest and best, the guidelines contained in the above cases and opinion are instructive. Because the officers of the political subdivision are best aware of the needs of the subdivision which a particular bidding procedure is designed to meet, the determination of "best" is properly left to the discretion of such officers. As long as that discretion is exercised in good faith, the award is not subject to interference by the courts.

The factual possibilities inherent in your fourth question are legion. Therefore, we offer the guidelines adopted by the courts and respectfully decline to answer the specific aspects of your fourth question.

#### CONCLUSION

It is the opinion of this office that pursuant to Section 67.150, RSMo Supp. 1981, and with specific reference to the types of insurance authorized by that section, all renewals of presently existing insurance contracts and all future insurance contracts of political subdivisions must be competitively bid. A political subdivision need not rebid its insurance contracts annually; a political subdivision may not enter into a contract that would create an indebtedness in excess of the revenue and income for the current year plus any unencumbered balances from previous years. Any proposed material modification of an insurance contract requires that the contract be rebid. A political subdivision may accept only those bids which meet the specifications established by the political subdivision. The determination of the "lowest and best" bid properly lies within the discretion of the authorities of the political subdivision.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Patricia Perkins.

Very truly yours,



JOHN ASHCROFT  
Attorney General

AIR CONSERVATION COMMISSION:  
CITIES, TOWNS AND VILLAGES:  
COUNTY COURTS:  
DEPARTMENT OF NATURAL RESOURCES:  
STATE PROPERTY:

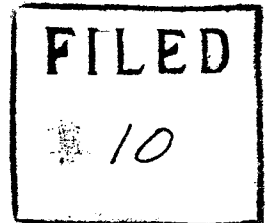
A city or county holding a certificate of authority from the Missouri Air Conservation Commission may adopt ordinances or resolutions to regulate emissions

from state-owned air contaminant sources, may adopt ordinances or resolutions which require the state to obtain a permit prior to enlarging a state-owned air pollution source, may adopt ordinances or resolutions which authorize the inspection of state-owned air contaminant sources, and may by ordinance or resolution require emission inventories from and source testing of state-owned air contaminant sources.

October 8, 1982

OPINION NO. 10

Fred A. Lafser, Director  
Department of Natural Resources  
Post Office Box 176  
Jefferson City, Missouri 65101



Dear Mr. Lafser:

This opinion is in response to your request that we answer the following questions:

1. Do local agencies holding a certificate of authority from the Missouri Air Conservation Commission have authority to regulate emissions from state-owned air pollution sources?

2. Do local agencies holding a certificate of authority from the Missouri Air Conservation Commission have permitting authority over modifications to existing state-owned air pollution sources located within their area of jurisdiction?

3. Do local agencies holding a certificate of authority from the Missouri Air Conservation Commission have authority to enter state-owned property for the purpose of inspections of air pollution sources?

Fred A. Lafser

4. Do local agencies holding a certificate of authority from the Missouri Air Conservation Commission have authority to require source testing of state-owned air pollution sources?

5. Do local agencies holding a certificate of authority from the Missouri Air Conservation Commission have authority to levy fines and/or file suit against state-owned sources of air pollution?

6. Do local agencies holding a certificate of authority from the Missouri Air Conservation Commission have authority to require state-owned air pollution sources to complete and submit emission inventories?

The answers to these questions involve construction of Section 203.140 (all statutory references are to RSMo 1978) of the Missouri Air Conservation Law, Chapter 203, RSMo 1978. That section, in general, sets forth a scheme whereby local governments are authorized to play a role in the regulation of air pollution. Three prefatory comments are in order. First, we note that your questions refer to "air pollution sources." We assume that such term is synonymous with the term "air contaminant source," as used in the Air Conservation Law; we will use the statutory term. Second, the Air Conservation Law refers to an executive secretary to the Air Conservation Commission. In Opinion No. 235 (1974), we held that the position of the executive secretary was abolished by the Omnibus State Reorganization Act of 1974, Senate Bill No. 1, First Extraordinary Session, 77th General Assembly, and that the functions of the executive secretary, after reorganization, were assumed by the director of the Department of Natural Resources. Therefore, where the statutes now refer to the executive secretary, we will refer to the director. Third, Section 203.140 provides that "any city or county of this state is empowered, . . . to enact and enforce ordinances or resolutions with respect to air pollution control. . . ." For purposes of this opinion, we interpret the phrase "local agencies" as used in each of your questions to mean a city or county holding a certificate of authority pursuant to Section 203.140.

In answering your questions, we must first determine whether Section 203.140 authorizes cities and counties to engage in the regulatory activity mentioned in each question. We must then determine whether the authority to regulate, if extant, extends to regulation of air contaminant sources operated by the state and

Fred A. Lafser

its agencies. We initially point out that we cannot answer these questions with regard to the actual effect of the ordinances or resolutions of any particular city or county, as we do not have reference to those ordinances or resolutions. Therefore, we provide our opinion only in terms of the authority of cities and counties to regulate, and do not consider whether such regulation has been accomplished by ordinance or resolution.

Section 203.140.1 provides, in part:

Subject to the provisions of this section, any city or county of the state is empowered, notwithstanding any limitation or provision of law to the contrary, to enact and enforce ordinances or resolutions with respect to air pollution control to accomplish the purposes of [the Air Conservation Law] which are consistent with the provisions of [the Air Conservation Law] and applicable standards, rules and regulations promulgated hereunder.

The portion of Section 203.140.1 set forth is the starting point for our answer to each of your questions. This provision is, in clear terms, a broad grant of authority to cities and counties. It empowers all cities and counties to adopt and enforce air pollution control ordinances, notwithstanding any other provision of law to the contrary. So long as the local ordinance or resolution is aimed at accomplishing a purpose of the Air Conservation Law, and is not inconsistent with the Air Conservation Commission, the adoption and enforcement of the ordinance or resolution is authorized.

We note that each of your questions asks about the authority of a city or county holding a certificate of authority. Section 203.140.1 also authorizes the Air Conservation Commission to grant such certificates to constitutional and special charter cities and counties, and first and second class cities and counties. Upon receipt of a certificate, a city or county may operate within its boundaries its own permit and variance procedures, and if the procedures set forth in Section 203.140.2 are followed, the permit or variance issued by the certificate holder will serve as a permit or variance granted by the Air Conservation Commission as provided in Section 203.140.3.

1. Authority to regulate emissions.

Section 203.050.1(1) provides, in part, that the Air Conservation Commission has the power to adopt rules and regulations providing for:

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(a) Regulation of use of equipment known to be a source of air contamination; and

(b) Establishment of maximum quantities of air contaminants that may be emitted from any air contaminant source;

It is evident from Section 203.050.1(1) that one of the purposes of the Air Conservation Law is to accomplish regulation of emissions from air contaminant sources. As cities and counties are empowered by Section 203.140.1 to adopt ordinances or resolutions to accomplish the purposes of the Air Conservation Law, we conclude that cities and counties may adopt ordinances or resolutions which regulate emissions from air contaminant sources.

2. Authority to require permits for modifications to existing sources.

Section 203.075.1 prohibits construction of an air contaminant source without a permit, unless the source is within a class of sources exempted by the Air Conservation Commission. Further, Section 203.075.3 provides that "[b]efore issuing a permit to build or enlarge an air contaminant source . . .", the director shall make certain determinations. The specific reference to enlargements in subsection 3 of Section 203.075 leaves no doubt that a permit is required for an enlargement of a source, as well as for its original construction.

We are aware of Air Conservation Commission Regulation 10 CSR 10-6.060, respecting permitting requirements. That regulation requires permits for certain categories of "modifications," which are clearly enlargements to existing air contaminant sources, and we assume that you use the term modification in the same sense. Therefore, to the extent that a modification constitutes an enlargement of a source, one of the purposes of the Air Conservation Law is to require permits for such modifications. We believe that a city or county may require a permit for such a modification.

3. Authority to enter property to conduct inspection of sources.

Section 203.050.1(8) empowers the Air Conservation Commission to:

[E]nter or authorize any representative of the commission to enter at all reasonable times and upon reasonable notice in or upon any private or public property for the pur-

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pose of inspecting or investigating any condition which the commission or [director] shall have probable cause to believe to be an air contaminant source.

Under the above-quoted provision, one of the evident purposes of the Air Conservation Law is to authorize entry on both public and private property to conduct inspections of air contaminant sources. Therefore, we conclude that under Section 203.140.1 a city or county may upon proper ordinance or resolution, and within relevant constitutional limitations, enter property to conduct inspections of air contaminant sources.

4. Authority to require source testing.

We understand source testing, as you use the term, to refer to scientific tests conducting at or upon an air contaminant source to determine if that source is in compliance with some regulation or ordinance limiting emissions of air contaminants. Under Section 203.050.1(3)(a), one of the powers of the Air Conservation Commission is as follows:

To require persons engaged in operations which result in air pollution to file reports containing information relating to rate, period of emission and composition of effluent; . . .

We believe that Section 203.050.1(3), when it authorizes the Commission to require reports from a source regarding the rate and period of its emission, and the composition of its effluent, authorizes the type of source testing to which you refer. It is clear under that provision not only that the testing may be done, but that the source can be required to do the testing. We conclude that Section 203.140.1 authorizes cities and counties to adopt ordinances or resolutions to require source testing to the same extent as may be required by the Air Conservation Commission.

5. Authority to enforce ordinances or resolutions against sources.

We construe your question to ask whether a city or county may by the appropriate action seek to enforce its ordinances or resolutions respecting air pollution control by either suit for injunctive relief, to prevent violations, or suit to impose a penalty, or both. Section 203.140.1 clearly provides that cities and counties may "enforce" their air pollution ordinances and resolutions. However, the precise method of enforcement may be different,

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depending on which type of local government is considered, and the nature of the ordinance or resolution enacted by the city or county upon which enforcement is based.

Your fifth question raises questions about the ability of a subdivision of the state to levy monetary fines against the state. Because this office has a statutory duty to represent and defend the state, we respectfully decline to render an opinion regarding the ability of a political subdivision to seek financial penalties against the state.

6. Authority to require sources to complete and submit emission inventories.

We understand an emission inventory to refer to a report from the source providing information concerning the types of air contaminant sources within a facility, the types and amounts of raw materials and fuels used in each source, and other information needed to calculate emission rates. We believe that such information falls within the purview of the Air Conservation Commission's power under Section 203.050.3(a) to require sources to report information relating to the rate and period of emissions and composition of effluents. We believe that such inventories are further authorized by Section 203.050.1(8), which empowers the Commission to "[d]evelop such facts, and make such investigations as are consistent with the purposes of [the Air Conservation Law]." Therefore, we conclude that Section 203.140.1 authorizes cities and counties to require operators of air contaminant sources to submit emission inventories respecting such sources.

It is clear that the legislature intended the Air Conservation Law to apply to state-owned sources. Section 203.020(13) defines person to include "any agency, board, department or bureau of the state or federal government. . . ." Further, Section 203.020(3) defines air contaminant source as "any and all sources of emission of air contaminants whether privately or publicly owned or operated." The legislature obviously intended that state-owned sources would be subject to the same regulation as all other sources. Therefore, when Section 203.140 authorizes cities and counties to adopt ordinances or resolutions to accomplish the purposes of the Air Conservation Law, that authorization necessarily includes the authority to regulate state-owned sources.

#### CONCLUSION

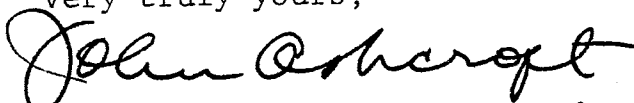
It is the opinion of this office that a city or county holding a certificate of authority from the Missouri Air Conservation Commission may adopt ordinances or resolutions to regulate emissions

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from state-owned air contaminant sources, may adopt ordinances or resolutions which require the state to obtain a permit prior to enlarging a state-owned air pollution source, may adopt ordinances or resolutions which authorize the inspection of state-owned air contaminant sources, and may by ordinance or resolution require emission inventories from and source testing of state-owned air contaminant sources.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Dan Summers.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

JOHN ASHCROFT  
Attorney General

CITIES, TOWNS AND VILLAGES:

COUNTY COURTS:

LANDFILLS:

NATURAL RESOURCES, DEPARTMENT OF:

SOLID WASTES:

A second class county may, pursuant to Sections 260.215.2 and 260.215.4, RSMo, adopt a reasonable ordinance or regulation regarding the location of landfills within the unincorporated areas

of the county, without becoming responsible for the requirements placed on cities and counties by Section 260.215.1. In the adoption of such an ordinance or regulation, the county court must follow the procedures outlined in Section 260.215.4. Such an ordinance or regulation, if adopted by the county, would be applicable to a third class city which proposes to locate a landfill in the unincorporated areas of the county.

September 29, 1982

OPINION NO. 13

The Honorable Diane Garber  
Prosecuting Attorney  
Callaway County Courthouse  
Fulton, Missouri 65251



Dear Ms. Garber:

This is in response to a request from your predecessor for our opinion regarding the following questions:

1. May a second class county enact an ordinance, such as the one attached as "Exhibit A", under the provisions of Section 260.215.2 or is it limited to enacting rules and regulations by court order under this section?
2. Would an ordinance, such as the one attached as "Exhibit A", be lawful in that it is for one specific purpose, i.e., limiting the location of landfills, or would such an ordinance have to be more comprehensive, dealing with storage, collection, transportation, processing or disposal of solid wastes?
3. If an ordinance, such as the one attached as "Exhibit A", was proposed, would it be necessary to follow the procedure outlined in Section 260.215.4 (publication and public hearing) prior to passage?

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4. By enacting an ordinance under Section 260.215.2 and Section 260.215.4 does a second class county remove itself from the exception provided for second class counties in Section 260.215.4 and does it then become responsible for the requirements of Section 260.215.1?

5. If an ordinance, such as the one attached as "Exhibit A", is passed, is it enforceable against a third class city?

The opinion request makes reference to an ordinance appended thereto. We view the proposed ordinance, in general, to impose a system of regulation on the location of solid waste disposal areas (landfills) in the county which requires that a permit be obtained from the county court prior to location of a landfill. In this opinion we take no view of the validity of the particular provisions of the proposed ordinance, either under Sections 260.200 to 260.245 (all statutory references will be to RSMo 1978), or under the Missouri and the United States Constitutions. A regulation controlling the disposal of solid waste is an exercise of the police powers for the protection of the public health and welfare. Craig v. City of Macon, 543 S.W.2d 772 (Mo. banc 1976). A police power measure, to be valid, must be reasonable. Id. Throughout this opinion we assume that your questions regard a reasonable regulation adopted by a second class county concerning the location of landfills within its boundaries. We do not, nor will we, opine on the reasonableness of county regulations.

The facts supplied with the opinion request indicate that the third class city proposes to locate a solid waste disposal site in the unincorporated area of the second class county. Our answers to the questions posed are limited to such a fact situation.

In providing this opinion, we find it convenient to address your second and fourth questions first. We view those two questions as asking whether a second class county may elect, under Section 260.215.4, to confine its regulatory activity to the location of solid waste disposal facilities, or must the county also, if it wishes to regulate solid waste at all, regulate all aspects of solid waste management comprehensively, including storage, collection, transportation, processing and disposal of solid waste, and make provision for solid waste collection and disposal within the county.

In answering this question, a thorough analysis of Section 260.215 is required. Subsection 1 of Section 260.215 provides that, except as provided in subsection 4 of that section, each city and

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county has a duty to provide for the collection and disposal of solid waste within its boundaries and shall be responsible for implementing its solid waste management plan adopted and approved pursuant to Section 260.220. Subsection 1 also provides that cities and counties may acquire equipment, land, buildings and other structures and facilities for the purpose of collecting and disposing of solid waste, and further provides authority to levy service charges and a tax to implement a plan for solid waste management.

Subsection 2 provides that any city or county may adopt ordinances, rules, regulations or standards for the storage, collection, transportation, processing or disposal of solid wastes. These ordinances, rules, regulations and standards must be in conformity with the rules and regulations adopted by the Department of Natural Resources for solid waste management. However, the statute is not to be construed to preempt cities and counties from adopting ordinances and regulations which are more stringent than the rules and regulations promulgated by the department.

Subsection 3 is not relevant to the determination of your question. Subsection 4, in relevant part, provides that nothing in Sections 260.215 and 260.220 applies to specified categories of cities and counties, including unincorporated areas of a second class county. However, an exempted city or county may elect to exercise powers under the statute in accordance with the procedure set out in subsection 4.

A close reading of Section 260.215 reveals that it deals with two functionally distinct subjects: (1) the provision of collection and disposal services by the city or county (subsection 1), and (2) the regulation of other persons or entities which deal with solid waste (subsection 2).

Section 260.215.2, provides in relevant part:

Any city or county may adopt ordinances, rules, regulations, or standards for the storage, collection, transportation, processing or disposal of solid wastes . . . [Emphasis added.]

Subsection 2 appears to authorize cities and counties to adopt ordinances or regulations dealing with any aspect of solid waste, irrespective of whether such ordinances or regulations are contained within a comprehensive plan for a solid waste management system. Therefore, we view Section 260.215.2 as a separate grant of authority to cities and counties, which stands independent and apart from the authority granted in subsection 1.

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Our view in this regard is buttressed by the provisions of Section 260.215.4. That subsection, in dealing with the election to regulate despite the exemptions from Section 260.215 contained therein, specifically sets forth distinct subjects which may be addressed by the exempt city or county. The first of the subjects is the acquisition of equipment, land, buildings and other facilities, the levying of service charges and a tax, and doing all other things necessary to provide for a solid waste management system, as provided in Section 260.215.1. The second is the adoption of ordinances, rules, regulations or standards as provided in Section 260.215.2. In addition, authorization to contract as provided in Section 260.215.3 is granted.

Each of these three areas of concern set forth in Section 260.215.4 is separated from the others by a semicolon. The separate treatment of the subjects of subsections 1, 2 and 3 in Section 260.215.4 evidences a legislative intent that each of these subjects is to stand independently. We believe that the legislature has expressed an intent that an exempt city or county may elect to exercise the powers granted in Section 260.215.2, without also assuming the responsibilities imposed by Section 260.215.1.

In answering your first question, we must look to the statutes authorizing the county court to take action. Except for the constitutional authority given to the county courts to manage the fiscal affairs of the county, such courts may exercise only such powers as are granted by statute or necessarily implied by statute. St. Francois County v. Brookshire, 302 S.W.2d 1 (Mo. 1957). The county court must act in the manner authorized by statute, and in no other. Cf. Schmoll v. Housing Authority of St. Louis County, 321 S.W.2d 494 (Mo. 1959).

We find no statute or constitutional provision which sets a uniform method by which a county court is to take action. Many statutes provide that the county court is to take action "by order" or "by order entered of record." See, e.g., Sections 49.265, 49.280, 49.290. Other statutes authorize or require county court action without specifying a procedure for such action. See, e.g., Sections 49.079, 49.170, 49.273. We have found one statute which provides that the county court may take action by resolution of a majority of the court. See Section 203.140.7. In addition Section 304.130 provides that a first class county may "by order or ordinance" regulate vehicular traffic.

Section 260.215.2, which authorizes the county court of a second class county to regulate the disposal of solid waste, provides that "any city or county may adopt ordinances, rules, regulations or standards. . . ." The statute is clear on its face, authorizing both

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cities and counties to adopt ordinances, as well as rules, regulations and standards. Although it may be a departure from normal practice for the legislature to authorize a second class county to adopt ordinances, we know of no provision of the Missouri Constitution which prohibits the legislature from granting such authority. Therefore, we conclude that a second class county, if it elects under Section 260.215.4 to regulate the disposal of solid waste, may do so by adoption of an ordinance.

As Section 260.215.2 also authorizes a county court to adopt rules, regulations or standards, we do not believe that the county court is limited to action by ordinance. We believe the difference between an ordinance and a regulation for purposes of Section 260.215.2 is one of semantics. There are no statutory formalities for the adoption of an ordinance or regulation by a county, save the general requirements of Section 49.070 respecting quorums and voting by the county court. Further, there appear to be no formal prerequisites for the adoption of a county court order, save Section 49.070. In either case, the county court action, to be valid, must be shown in the records of the court, after vote of the court. State ex rel. Walton v. Miller, 297 S.W.2d 611 (Mo.App. 1956); Missouri-Kansas Chemical Company v. Christian County, 180 S.W.2d 735 (Mo. 1944). Therefore, we believe that the county court may exercise its regulatory powers under Section 260.215.2 by compliance with Section 49.070, irrespective of whether the court's action is called an ordinance or a regulation.

In answer to your third question, we believe that Section 260.215.4(1) is clear. That subsection, after providing for an exemption from Sections 260.215 and 260.220 for certain classes of cities and counties, continues as follows:

[P]rovided, however, that any exempted city, village or county, nonetheless, after public hearing held on not less than twenty days' public notice by publishing a copy of the notice in some newspaper qualified to publish legal notices under chapter 493, RSMo, and having a general circulation within the city, village or county once each week for three consecutive weeks, may elect through its governing body . . . .

The statutory prerequisites are clear. An exempt city or county may adopt an ordinance, rule, regulation or standard under Section 260.215.2 only after compliance with the publication and hearing requirements set forth in Section 260.215.4(1).

The Honorable Diane Garber

In answering your fifth question, as in our previous answers, we express no opinion regarding the validity of the specific proposed ordinance appended to your opinion request. We will treat your question as asking whether an ordinance or regulation enacted by a county for the purpose of reasonably regulating the location of landfills within its boundaries applies to a third class city.

Your question concerns a conflict between two political subdivisions in the exercise of their respective statutory police powers. A number of Missouri cases have dealt with such conflicts, several of which you have cited to us. Most of these cases involve conflicts arising from acquisition of property for a public use by one political subdivision and enforcement of zoning regulations by another political subdivision. See State ex rel. St. Louis Union Trust Company v. Ferriss, 304 S.W.2d 896 (Mo. banc 1957); State ex rel. Askew v. Kopp, 330 S.W.2d 882 (Mo. 1960); St. Louis County v. City of Manchester, 360 S.W.2d 638 (Mo. banc 1962); Appelbaum v. St. Louis County, 451 S.W.2d 107 (Mo. 1970); State ex rel. City of Gower v. Gee, 573 S.W.2d 107 (Mo.App. 1978); City of Kirkwood v. City of Sunset Hills, 589 S.W.2d 31 (Mo.App., E.D. 1979).

An examination of the Missouri cases in which conflicts between local governmental entities regarding police power regulation are involved reveals that there is no general rule by which it can be determined which entity's regulations prevail. Instead, the resolution of the question in each case involves a review of the statutes and constitutional provisions to determine the legislature's intent with regard to regulation in the particular matter at issue. In making that determination, as you request that we do, we must construe all the constitutional and legislative provisions together, harmonizing them if possible. St. Louis County v. City of Manchester, *supra*; City of Kirkwood v. City of Sunset Hills, *supra*.

We believe that the conflicting exercise of powers you raise can be readily harmonized so as to give effect to both. Article IV, Section 37, Missouri Constitution provides:

The health and general welfare of the people are matters of primary public concern; and to secure them there shall be established a department of social services in charge of a director appointed by the governor, by and with the advice and consent of the senate, charged with promoting improved health and other social services to the citizens of the state as provided by law, and the general assembly may grant power with respect thereto to counties, cities or other political subdivisions of the state.

The Honorable Diane Garber

From this constitutional foundation rise statutory powers granted both to cities and counties to protect the health and welfare of the people. Section 71.680 grants power to third class cities to dispose of "garbage, trash, cinders, refuse matter and municipal waste. . . ." Section 260.215 provides cities and counties with authority to implement solid waste management plans.

The purpose of Sections 260.200 to 260.245 is to control the threats to the public health and the environment which result from the uncontrolled accumulation and improper disposal of solid waste comprehensively. To that end, the legislature not only empowered cities and counties to provide for the proper collection and disposal of wastes generated within their respective boundaries, but also provided a scheme for regulation of the disposal of such wastes.

Under Sections 260.205 and 260.210, anyone operating a landfill, including a governmental entity, must obtain a permit from the Department of Natural Resources and operate in accordance with its regulations. A review of the suitability of a particular location for landfill purposes is obviously a proper subject of regulation; the Department does conduct such a review under its regulations. See Regulation 10 CSR 80-3.010(4). Section 260.215.2 authorizes cities and counties, including a second class county, to adopt ordinances and regulations for the disposal of solid waste. While the local ordinances and regulations must be in conformity with the Department's regulations, they may be more stringent than the Department's regulations. Therefore, the legislature has clearly indicated an intent that local governments may regulate the operation of a landfill to at least the same extent as such operation may be regulated by the Department of Natural Resources.

We believe that the legislature, in its enactment of a comprehensive statutory scheme concerning solid waste management and in particular, Section 260.215, has expressed an intent to subject a third class city, in its location and operation of a landfill, to reasonable regulation by the county in which the landfill is located. We can discern no legislative intent to vest in the city the exclusive power to choose the location or means of operation of the landfill. As the county has been vested by the legislature with the power to regulate in this regard, the city is subject to such regulation. Subjecting the city to reasonable regulation by the county will not prevent the city from exercising its authority to locate and operate a landfill, consistent with the purposes and limitations of Sections 260.200 to 260.245.

The Honorable Diane Garber

CONCLUSION

It is the opinion of this office that a second class county may, pursuant to Sections 260.215.2 and 260.215.4, RSMo, adopt a reasonable ordinance or regulation regarding the location of landfills within the unincorporated areas of the county, without becoming responsible for the requirements placed on cities and counties by Section 260.215.1. In the adoption of such an ordinance or regulation, the county court must follow the procedures outlined in Section 260.215.4. Such an ordinance or regulation, if adopted, would be applicable to a third class city which proposes to locate a landfill in the unincorporated areas of the county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Dan Summers.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft".

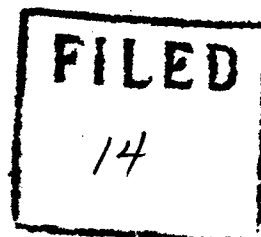
JOHN ASHCROFT  
Attorney General

CITY-COUNTY LIBRARIES:  
LIBRARY DISTRICTS:  
INDEBTEDNESS:  
CONSTITUTIONAL LAW:

A city-county library district  
organized under Chapter 182,  
RSMo, may borrow short term  
funds for operating expenses.

March 25, 1982

OPINION NO. 14



The Honorable Fred Dyer  
Senator, District 2  
Room 428A, State Capitol Building  
Jefferson City, Missouri 65101

Dear Senator Dyer:

This opinion is in response to the request of your predecessor  
in office asking:

May a City-County Library District orga-  
nized under Chapter 182 R.S.Mo. borrow short  
term funds (for less than one year) for  
operating expenses?

The opinion request outlined the following facts:

The St. Charles [City-County] Library Dis-  
trict was organized in 1951. Unlike many newly  
created districts it did not go into operation  
before it had funding. That is, it waited un-  
til the taxes were collected under its two mill  
levy (Section 182.015) before it commenced oper-  
ation and did not thereby borrow any operating  
funds at the outset. The district has been able  
to operate 100% within its operating levy and  
has never borrowed funds with which to operate.

The District is now contemplating some sub-  
stantial capital improvement expenditures (build-  
ings, equipment, etc.). If expended these funds  
will cut considerably into operating levies and  
the district would like to borrow short term  
operating money (for less than one year).

The Honorable Fred Dyer

Nothing in Chapter 182 or any other statute expressly authorizes a city-county library district to borrow money in the manner which you outline. Nevertheless, the Constitution of Missouri (1945) provides at Article VI, Section 26(a):

No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this constitution. [Emphasis added.]

Under Section 182.291, RSMo, a city-county library district has the rights, powers and privileges granted county library districts. Section 182.070, RSMo, provides that a library district shall be a "body corporate;" therefore, such a library district falls within the provisions of Article VI, Section 26(a).

Although this constitutional provision merely sets a limit on the amount that a political corporation can borrow in any year, the Supreme Court of Missouri has ruled that the provision is "a self-enforcing grant of power to [political corporations] to incur an indebtedness. . . ." First National Bank of Stoutland v. Stoutland School District R2, 319 S.W.2d 570, 573 (Mo. 1958) (see cases cited therein). See also, Drey v. McNary, 529 S.W.2d 403 (Mo. banc 1975). In First National Bank of Stoutland, the court stated that although there was no statute which expressly provided for borrowing by a political corporation in anticipation of the year's revenues, Article VI, Section 26(a), grants political corporations an inherent right to borrow in the manner outlined.

Thus, we conclude, on the authority of Article VI, Section 26(a), and First National Bank of Stoutland, supra, that the St. Charles City-County Library District may borrow funds for operating expenses.

---

<sup>1</sup>We render this opinion fully aware of Fulton National Bank v. Callaway Memorial Hospital, 465 S.W.2d 549 (Mo. 1971), in which the court stated, "It is really hornbook law that neither a county nor any instrumentality of a county may contract any form of indebtedness, absolute or contingent, except such as is permitted by statute." This case is distinguishable from the holding in First National Bank of Stoutland, supra, because the quoted statement was dicta, and not the basis of the court's holding, and because the decision was concerned only with the question of the right of an instrumentality of the county to borrow, and not the county's authority to borrow lawfully.

The Honorable Fred Dyer

The opinion request suggests that the library district desires to borrow funds for operating expenses because it is "contemplating some substantial capital improvement expenditures (buildings, equipment, etc.)." For this reason, we feel compelled to inform you of a number of statutory provisions which are applicable to such expenditures.

Section 182.070, RSMo 1978, grants a library district the power to:

purchase, or lease grounds, purchase, lease, occupy or erect an appropriate building for the use of the county library and branches thereof out of current funds if such funds are available above those necessary for normal operations or, as provided in section 182.105, . . .

This section suggests that a library district cannot undertake a capital improvements project if the project would impair funds necessary for normal operations.


You should also be aware of the provisions of Sections 182.100 and 182.105, RSMo 1978. Section 182.100 states that a library district desiring to erect a building may establish a special building fund consisting of a maximum property tax of two mills on the dollar levied for a maximum of ten years. Section 182.105 provides for the issuance of bonds to erect a building or improve an existing building.

#### CONCLUSION

It is the opinion of this office that a city-county library district organized under Chapter 182, RSMo, may borrow short term funds for operating expenses.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul M. Spinden.

Very truly yours,

  
JOHN ASHCROFT  
Attorney General

*Attorney General of Missouri*

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

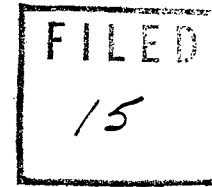
JOHN ASHCROFT  
ATTORNEY GENERAL

(314) 751-3321

November 9, 1982

OPINION LETTER NO. 15

The Honorable Larry Mead  
Representative, District 111  
Room 203, Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Mead:

This letter is in response to your question asking as follows:

Can the teachers fund of a school district be used to provide a self-funded health benefits program for teachers or must it be used only for an insured program in which premiums are paid?

You also state:

The Missouri School Boards Association is contemplating establishment of insurance programs for member districts. The program contemplates a self-funded health benefits package in which premiums would not be paid to an insurance company but would be placed in a fund from which benefits are to be paid. There would be a stop clause provision to ensure that the district would not spend more than the amount budgeted in the insurance trust.

We have also been furnished with a copy of the administrative services agreement which is proposed between the school districts and the administrator. We will not attempt to pass upon all of the provisions respecting such agreement, however, we point out a few problems which we believe clearly exist.

That portion of the proposed plan calling for deposit and disbursement of plan funds appears to violate several statutory provisions forbidding the handling of school funds by anyone but the

The Honorable Larry Mead

treasurer. Section 165.021, RSMo, for example, requires the disbursement of all school moneys by treasurers of school districts. Section 162.641, RSMo, sets out specific duties for the treasurer of a metropolitan school district with respect to the supervision of funds. Further, Sections 162.401 and 162.541 provide in similar manner but in less detail for the duties of the treasurer in a six-director district and in an urban district, respectively. Thus, it appears that that portion of the proposed agreement which calls for issuance of claim checks and payments of the excess loss and other costs by the administrator on behalf of the school district is contrary to Missouri law. Further, that portion of the agreement which states that the administrator is acting only as agent of the school district would not be sufficient to satisfy the strict requirements contained in Sections 165.021, 162.641, 162.401 and 162.541, RSMo.

One could interpret the single payment by the school district to the administrator each month, covering all the costs of the plan, as the only disbursement of school district funds, and thus, the only one necessary to be made by the treasurer. However, because the agreement emphasizes the agency of the administrator, and because medical claims are paid on behalf of the school district, it appears that at least a percentage of these funds remain school district funds and are used to pay the indebtedness of the school district, within the meaning of subsections 2 and 4 of Section 165.021, RSMo. Therefore, such funds would have to be maintained in a school fund and disbursed by the treasurer of the school district.

Another potential problem is presented by Section 162.641 which states, in part, that the metropolitan school district treasurer must be the custodian of ". . . all securities, documents, title papers, books of record and other papers belonging to the board, . . . and shall preserve in his office all accounts, vouchers and contracts pertaining to school affairs." The words of the statute may be narrow enough to leave out records of the processing of claims, or allow for a set of duplicate records to be maintained by the administrator. Since the statute requires that certain of the records be maintained in the treasurer's office, one cannot argue that this duty can be delegated to an agent located elsewhere.

Therefore, it appears that the proposed agreement violates state law in several ways. While it may be possible to make technical modifications correcting the difficulties mentioned, the difficulties in drafting a plan which would meet the precise requirements of existing state law appear to be numerous. Therefore, it appears that legislative authorization to effect and implement such a plan should be sought.

In addition, the enactment of Section 67.150, RSMo Supp. 1982, clearly raises the question as to whether or not the procedure provided in such section is exclusive.

The Honorable Larry Mead

Such section provides:

1. The governing body of any political subdivision may utilize the revenues and other available funds of the subdivision, as a part of the compensation of the employees of the subdivision, to contribute to the cost of a plan, including a plan underwritten by insurance, for furnishing all or part of hospitalization or medical expenses, life insurance or similar benefits for the subdivision's employees.

2. No contract shall be entered into by the governing body of the political subdivision to purchase any insurance policy or policies pursuant to the terms of this section unless the contract is submitted to competitive bidding and the contract is awarded to the lowest and best bidder.

We enclose a copy of our Opinion No. 9, to Wilson, dated October 12, 1982, in which we discussed the procedure to be followed pursuant to Section 67.150 in some detail.

It seems clear that the enactment of Section 67.150 without any provision for a plan such as you describe may be argued as foreclosing the use of such a plan. Section 67.150 was enacted in 1980 and there are no appellate case decisions on the question of whether or not the provisions of such section are exclusive.

It, therefore, seems clear that we are not in a position to recommend implementation of such a plan in the absence of specific legislative authority.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal line extending to the right.

JOHN ASHCROFT  
Attorney General

Enclosure:

Opinion No. 9-1982

*Attorney General of Missouri*

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

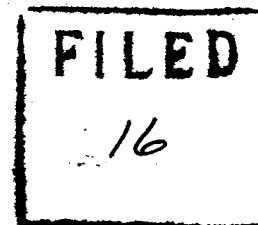
JOHN ASHCROFT  
ATTORNEY GENERAL

(314) 751-3321

February 25, 1982

OPINION LETTER NO. 16

The Honorable Clarence H. Heflin  
Senator, District 16  
Room 417 State Capitol Building  
Jefferson City, Missouri 65101



Dear Senator Heflin:

This opinion is in response to your request which reads:

Will the Hancock Amendment have an effect on  
the attached piece of proposed legislation?

Does an increase in fees of a Professional  
board fall under the jurisdiction of the  
Hancock Amendment?

This opinion will deal with your second question because it is the policy of this office not to issue official opinions on proposed bills, either introduced or to be introduced in the General Assembly.

We presume that the fees to which you refer are those paid by licensees for licensing by the various occupational registration and licensing boards of this state. See, for example, Sections 335.046 (Nurses) and 334.090 (Physicians and Surgeons), RSMo Supp. 1981. Thus, we believe your inquiry asks us to determine whether an increase in such fees must be approved by the voters pursuant to Article X, Section 22, Missouri Constitution.

Article X, Section 16 to 24, Missouri Constitution, adopted November 4, 1980, comprise the Hancock Amendment. Article X, Section 22(a) provides:

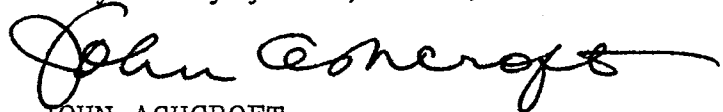
Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution when this section is adopted or from increasing the current levy of an exist-

The Honorable Clarence H. Heflin

ing tax, license or fees, above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon. If the definition of the base of an existing tax, license or fees, is broadened, the maximum authorized current levy of taxation on the new base in each county or other political subdivision shall be reduced to yield the same estimated gross revenue as on the prior base. If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the general price level from the previous year, the maximum authorized current levy applied thereto in each county or other political subdivision shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the general price level, as could have been collected at the existing authorized levy on the prior assessed value.

By its own terms, Article X, Section 22, requires only "[c]ounties and other political subdivisions" to submit increases in taxes, licences or fees to a vote of the people. Since the fees to which you refer are imposed by agencies of the state, Article X, Section 22 does not require that an increase in such fees be approved by the voters.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a long, sweeping horizontal stroke extending to the right.

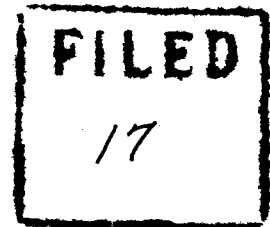
JOHN ASHCROFT  
Attorney General

MOBILE HOMES: A person who sells or offers for  
REAL ESTATE BROKERS: sale four or more mobile homes in  
PUBLIC SERVICE COMMISSION: any consecutive twelve-month period  
must register with the Public Service  
Commission as a dealer, pursuant to Chapter 700, RSMo 1978, regard-  
less of whether such person owns the mobile homes he or she sells  
or whether such person merely acts as an agent for a mobile home  
owner who wishes to sell only one mobile home.

February 1, 1982

OPINION NO. 17

The Honorable Jerry Ford  
Representative, 156th District  
Room 401A, State Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Ford:

This opinion is in response to your inquiry:

Do Missouri Real Estate Brokers and salespersons meet the requirements and qualifications pursuant to Section 700.010 (4) and 700.090 (3) in the sale of mobile homes located in mobile home parks or private property owned by persons other than those owning the mobile home?

Additionally, you inform us:

Many real estate brokers and their sales personnel are currently listing and selling more than 4 mobile homes per year (700.010) which are located in mobile home parks and private property owned by persons other than those persons owning the mobile home.

I'm interested in determining whether real estate sales people are subject to registration requirements if they sell more than four mobile homes per year.

The Honorable Jerry Ford

For purposes of this opinion we assume that the sales activities of the real estate brokers and salespersons (hereafter referred to as "agent") to which you refer do not involve the sale of a mobile home in connection with the sale of real estate; instead we assume you refer to activities of an agent who negotiates the sale of four or more used mobile homes in a consecutive twelve-month period (tangible personal property only) on behalf of non-dealer mobile home owners. We further assume that the mobile home owner retains title to the used mobile home throughout the negotiation period, and, after consummation of the sale, transfers title directly to the buyer.

Initially we note that Chapter 339, RSMo, governs the activities of real estate agents and brokers. We find no express or implied exemption from the provisions of Chapter 700, RSMo 1978, for real estate agents or brokers in Chapter 339. Neither do we find such an exemption for agents in Chapter 700.

Chapter 700 establishes mobile home standards for the State of Missouri. Section 700.090.1, RSMo 1978, provides in pertinent part:

Every manufacturer or dealer of mobile homes who sells or offers for sale, on consignment or otherwise, a mobile home, . . . from or in the state of Missouri shall register with the [Public Service] commission. [Emphasis added.]

Section 700.010(4), RSMo 1978, defines "dealer" as:

[A]ny person, other than a manufacturer, who sells or offers for sale four or more mobile homes, . . . in any consecutive twelve-month period; . . . [Emphasis added.]

Thus, we believe the resolution of your question turns on the applicability of the phrase "sells or offers for sale" to agents involved in four or more mobile home transactions in a consecutive twelve-month period; in short, our inquiry must determine whether such an agent is a "dealer" for purposes of Chapter 700.

We are bound to render this opinion within the confines of the rules of construction of statutes adopted by our courts. The primary rule of statutory construction is to seek the intent of the legislature. City of Willow Springs v. Missouri State Librarian, 596 S.W.2d 441, 596 (Mo. banc 1980). We are required

The Honorable Jerry Ford

to determine legislative intent from what the legislature said, not from what it may have intended to say or inadvertently failed to say. State ex rel. Igoe v. Bradford, 611 S.W.2d 343 (Mo.App. 1980). When a statute is enacted in the interest of the public welfare, it is remedial and must be construed liberally to promote the object of the legislature. State ex rel. Laundry, Inc. v. Public Service Commission, 34 S.W.2d 37 (Mo. 1931). When a statute contains both penal and remedial features (as does Chapter 700)<sup>1</sup> penal features must be construed strictly against the enforcing party; however, remedial features continue to be liberally construed: Grier v. Kansas City, C. C. & St. J. Ry. Co., 228 S.W. 454 (Mo. banc 1921); Murphy v. St. Louis-San Francisco R. Co., 226 S.W. 637 (Mo.App. 1920). Finally, terms used by the legislature should be given their plain, usual and ordinary meaning, unless otherwise expressly defined in the statute. State ex rel. State Highway Commission v. Wiggins, 454 S.W.2d 899 (Mo. banc 1970).

The phrases "sells or offers for sale" or "sells, offers for sale" are used in at least forty-five different Missouri statutes. In none of those instances is the phrase expressly defined. As the definition of the phrase "sells or offers for sale" is central to the resolution of your question, we believe the manner in which the legislature has used these phrases in other statutes will assist us in finding its meaning in Chapter 700.

Black's Law Dictionary (4th Ed. 1968) defines "sell" as "[t]o dispose of by sale." Id. 1525. "Sale" is defined as:

[a] contract whereby property is transferred from one person to another for a consideration of value, implying the passing of the general and absolute title, . . . Id. at 1503.

Our review of the statutory uses of above phrases leads us to believe that the General Assembly does not intend to limit the applicability of a statute employing the term "sell" to persons or entities having title or legal ownership of the property sold.

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1. Chapter 700 generally is designed to provide construction standards for the manufacture of mobile homes, recreational vehicles and modular housing units. As such, Chapter 700 is clearly in the interest of public welfare. However, Section 700.045 provides that certain, specified acts are misdemeanors, punishable under Missouri law.

The Honorable Jerry Ford

See, for example, Section 578.100, RSMo Supp. 1981, (prohibiting sales of goods on Sunday); Section 421.060, RSMo 1978 (proscribing the sale of used bedding without sterilization); and Section 196.886, RSMo 1978 (prohibiting the sale of certain drugs without proper labeling).

It is particularly clear that passage of title is not required for a sale to be completed by a real estate broker. Section 339.010.1, RSMo Supp. 1981, provides:

A "real estate broker" is any person, co-partnership, association or corporation, foreign or domestic who, for another, and for a compensation or valuable consideration, as a whole or partial vocation does, or attempts to do, any or all of the following:

- (1) Sells, exchanges, purchases, rents, or leases real estate;
- (2) Offers to sell, exchange, purchase, rent or lease real estate; . . . [Emphasis added.]

Thus under the statutory scheme, a real estate broker is "employed to sell real estate." Politte v. Wall, 256 S.W.2d 283, 285 (Mo.App. 1953). The broker's statutory authority to sell real property has been generally defined as follows:

The verb "sell" and the noun "sale" vary in meaning according to the different context in which they are used. . . . In contracts creating the relationship of principal and real estate broker, . . . [t]he broker "sells" when he finds a purchaser ready, able and willing to buy on the terms proposed by the principal. Humphries & Jackson v. Smith, 63 S.E. 248, 249 (Ga.App. )

See also Schaeffer v. Reineke, 121 S.W.2d 213, 220 (Mo.App. 1938).

We believe the provisions of Chapter 700 apply to all persons who sell four or more mobile homes in a consecutive twelve-month period. We are led to this conclusion by the statutory uses of the phrases "sell or offer for sale" and "sell, offers for sale." This conclusion is buttressed by reference to Section 339.010, RSMo Supp. 1981, and its predecessor Section 339.010, RSMo 1978.

The Honorable Jerry Ford

In both instances, the General Assembly clearly exempted the entities and persons to which the chapter does not apply. See, Section 339.010.5, RSMo Supp. 1981. Because no such exceptions are found in Chapter 700, we believe the legislature intended that the law apply without exception.

This opinion is not limited to real estate brokers and salespersons. Any person or entity selling four or more mobile homes in a consecutive twelve-month period is, in our opinion, a dealer required to register under Chapter 700.

#### CONCLUSION

It is the opinion of this office that a person who sells or offers for sale four or more mobile homes in any consecutive twelve-month period must register with the Public Service Commission as a dealer, pursuant to Chapter 700, RSMo 1978, regardless of whether such person owns the mobile homes he or she sells or whether such person merely acts as an agent for a mobile home owner who wishes to sell only one mobile home.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul Spinden, and deputy, Edward D. Robertson, Jr.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized flourish at the end.

JOHN ASHCROFT  
Attorney General

CLEAN WATER COMMISSION:  
WATER POLLUTION:  
PERMITS:  
NATURAL RESOURCES, DEPARTMENT OF:

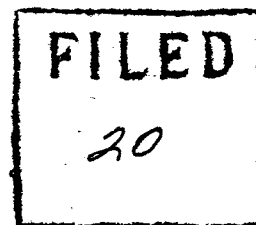
Section 204.051.3, RSMo  
1978, does not allow the  
issuance of general permits  
as contemplated under 40  
CFR 122.59. Section 204.051.3

does allow the issuance of general permits as provided in Clean Water  
Commission regulation 10 CSR 20-6.010. Sections 204.006 to 204.141,  
RSMo 1978, provide adequate authority to enforce any general permit  
issued pursuant to state law.

March 4, 1982

OPINION NO. 20

Mr. Fred Lafser, Director  
Department of Natural Resources  
1915 Southridge Plaza  
Jefferson City, Missouri 65101



Dear Mr. Lafser:

This is in response to your request for our opinion as follows:

Does the state have adequate legal authority  
to issue and enforce general permits pursuant  
to 40 CFR 122.59?

Section 122.59 of Title 40 of the Code of Federal Regulations (CFR) provides for the issuance of general permits under the National Pollutant Discharge Elimination System (NPDES) permit program. The original concept of an NPDES permit was that it would be issued, after application, for an individual pollutant source. 40 CFR 122.4, 122.53. Certain public notice and comment procedures attend the issuance of an NPDES permit. See generally, 40 CFR 124.10-15. In Opinion No. 255 - 1974 (copy attached), we held that Sections 204.006 to 204.141, RSMo 1978 (the Missouri Clean Water Law), provide adequate authority to issue and enforce permits in Missouri which meet the requirements under federal law for a state-run NPDES individual permit program.

The general permit program, as embodied in the federal regulations, contemplates a departure from the procedures which are a precondition to issuance of the individual NPDES permit. As we understand it, a general permit may be issued for storm sewers, or for a category of sources which involve substantially similar operations, discharge the same types of wastes, and

Mr. Fred Lafser, Director

require the same types of effluent limitations, operating conditions and monitoring. 40 CFR 122.59(a)(2). The general permit is to be written to cover all such sources in a given geographical area. Id. Provision is made for requiring an individual permit for a source, even if within the specified category and geographical area, under certain conditions which need not be discussed here. 40 CFR 122.59(b)(2).

The procedural prerequisites for the issuance of a general permit are the same as for issuance of individual permits. 40 CFR 122.59(b)(1). However, these prerequisites are not triggered by an application for a permit, as is the case with individual permits, as no application is required for inclusion in a general permit. 40 CFR 122.53(a). Instead, it appears that the administrative agency initiates the issuance of a general permit on its own motion. Once the procedural prerequisites, such as public notice and opportunity for hearing, are satisfied and the permit is issued, new sources appear to be automatically included in the permit. Existing sources with individual permits need only request that the individual permit be revoked. Upon revocation the source automatically becomes subject to the general permit. 40 CFR 122.59(b)(2)(v). Once a general permit has been issued, public notice is not given each time a source becomes subject to the general permit.

The statutory standards and prerequisites for issuance of permits under the Missouri Clean Water Law are found in subsections 2 and 3 of Section 204.051, RSMo 1978. We believe that these subsections control the question of whether general NPDES permits may be issued under Missouri law. Section 204.051 provides, in relevant part:

2. It shall be unlawful for any person to build, erect, alter, replace, operate, use or maintain any water contaminant or point source in this state that is subject to standards, rules or regulations promulgated pursuant to the provisions of sections 204.006 to 204.141 unless he holds a permit from the [clean water] commission, subject to such exceptions as the commission may prescribe by rule or regulation. . . .

3. Every proposed water contaminant or point source . . . shall make application to

Mr. Fred Lafser, Director

the [director]<sup>1</sup> for a permit at least thirty days prior to the initiation of construction or installation or establishment. Every water contaminant or point source in existence when regulations or sections 204.006 to 204.141 become effective shall make application to the [director] for a permit within sixty days after the regulations or sections 204.006 to 204.141 become effective, whichever shall be earlier. The [director] shall promptly investigate each application, which investigation shall include such hearings and notice, and consideration of such comments and recommendations as required by sections 204.006 to 204.141 and any federal water pollution control act. If he determines that the source meets or will meet the requirements of sections 204.006 to 204.141 and the regulations promulgated pursuant thereto, he shall issue a permit with such conditions as he deems necessary to insure that the source will meet the requirements of sections 204.006 to 204.141 and any federal water pollution control act as it applies to sources in this state. If the [director] determines that the source does not meet or will not meet the requirements of either act and the regulations pursuant thereto, he shall deny the permit under the applicable act and issue any notices required by sections 204.006 to 206.141 and any federal water pollution control act.

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<sup>1</sup>Sections 204.006 to 204.141, as adopted in 1973, refer to the executive secretary of the Clean Water Commission. In Opinion No. 235 -1974, we held that the position of executive secretary of the Clean Water Commission was abolished by adoption of the Omnibus State Reorganization Act of 1974, Senate Bill No. 1, First Extraordinary Session, 77th General Assembly. We further held in that opinion that the director of the Department of Natural Resources was required under the Reorganization Act to cause the policies of the Clean Water Commission to be executed, and therefore assumed the responsibilities of the executive secretary. In Opinion No. 156 - 1976, we held that the responsibility for issuing permits under Section 204.051 rests with the director of the Department of Natural Resources. We shall, in this opinion, refer to the director of the Department of Natural Resources, rather than the executive secretary.

Mr. Fred Lafser, Director

We note that subsection 3 provides that every proposed source "shall make application" for a permit at least thirty days prior to commencement of construction. With respect to sources in existence at the time the statute became effective, subsection 3 provides that every source "shall make application" within sixty days after the effective date. Subsection 3 goes on to require the director to promptly investigate each application, and requires the director to determine whether the source meets or will meet the requirements of Sections 204.006 to 204.141, the requirements of any federal water pollution control act, and the requirements of regulations promulgated under the state and federal statutes, prior to issuing or denying the permit. The director is expressly told to issue the permit if the source will meet the requirements of the statutes and regulations, and to deny the permit if the source will not meet those requirements.

We believe that Section 204.051.3 must be read to require that a permit be issued only after an application is made for the permit, and the director undertakes the specified investigation and makes the required determinations concerning the ability of the source to meet state and federal law. We believe it clear that the investigation and determinations must be made with respect to each individual source. It is our opinion that the director may not utilize a general permit system as contemplated by 40 CFR 122.59, because such a system would be contrary to Section 204.051.3.

We are cognizant of the provision in Section 204.051.2 that the Clean Water Commission may by regulation exempt sources or classes of sources from the requirement to obtain a permit. We read that provision to empower the Commission to waive permitting entirely, if it so chooses, but not to waive the application and determinations required by subsection 3, if a permit is required. We believe it clear from the arrangement of subsections 2 and 3, and the language used therein, that the legislature intended that certain prerequisites to the issuance of a permit would apply, if a permit were required by the Commission. Otherwise, we believe that the legislature would have expressly empowered the Commission, in subsection 3, to waive such of those prerequisites as it deemed appropriate, as the legislature did in subsection 2 with regard to the question of whether a permit would be required.

We are aware that the Clean Water Commission has recently adopted amendments to its permitting regulation, 10 CSR 20-6.010, to provide for the issuance of so-called general permits in certain circumstances. See 10 CSR 20-6.010(14). We note that

Mr. Fred Lafser, Director

unlike the federal regulations, the Commission's permit regulation does not excuse the source from making a specific application for inclusion in the general permit. Subsection (1)(A) of 10 CSR 20-6.010 provides that all persons who operate, use or maintain sources must apply to the director for the permits required by the Clean Water Law, with certain exceptions not relevant to this discussion. Section (14) of the rule, which authorizes general permits, does not exempt the source operator from making an application for inclusion in a general permit. Therefore, we read 10 CSR 20-6.010 to require that any operator of a source who wishes the source to be included in a general permit must apply to the director for such inclusion.

We are also aware that you have interpreted 10 CSR 20-6.010 to require the director, in proposing the issuance of a general permit, to delineate the category of sources which will be subject to the permit so that only sources which meet or will meet the requirements of state and federal law applicable to those sources will be includable in the general permit. After issuance of the general permit, we understand it is your intention to determine, upon receipt of an application for inclusion in the general permit, whether the particular source falls within the parameters of the specified category.

We are of the opinion that the issuance of general permits pursuant to 10 CSR 20-6.010, if carried out as described above, will meet the requirements of Section 204.051.3. Unlike the federal scheme, the state system does contemplate an application with regard to each source, and a determination with regard to each source that it meets or will meet the requirements of the statutes and regulations. The determination will be made before any source can be included in the general permit. This, we believe, satisfies the pre-issuance determination requirements of Section 204.051.3.

Your opinion request also references authority to enforce the general permits, once issued. As a general permit would be issued pursuant to Section 204.051, the same as with an individual permit, the general permit would be enforced in the same way as an individual permit. In Opinion No. 255 - 1974, we held, at Section 11 thereof, that Sections 204.006 to 204.141 contain adequate authority to enforce permits to the degree required by the federal statute and regulations. Therefore, what was said in Opinion No. 255 - 1974 is applicable to your question. Sections 204.006 to 204.141 do contain adequate authority to enforce general permits issued under Section 204.051 and 10 CSR 20-6.010.

Mr. Fred Lafser, Director

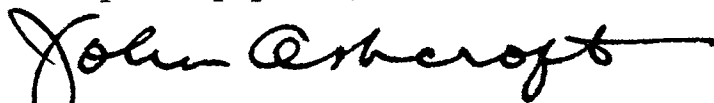
Your opinion request does not ask, nor do we answer, whether regulation 10 CSR 20-6.010 meets the minimum requirements of 40 CFR 122.59, so as to authorize the director to issue general permits under federal law. However, it is clear that the requirement under the state statute and regulation that an application be made for inclusion of a source in a general permit is not grounds for disapproval of the state's general permit program. 40 CFR 123.2(k) provides that with respect to the NPDES program, the states are not precluded from adopting a program which is more stringent or more extensive than the federal program. We view the individual application requirement of the state's general permit system to fall within the scope of 40 CFR 123.2(k).

#### Conclusion

It is our opinion that state law, specifically Section 204.051.3, RSMo 1978, does not allow the issuance of general permits as contemplated under federal regulation 40 CFR 122.59. However, it is our opinion that Section 204.051.3 does allow the issuance of general permits as provided in Clean Water Commission regulation 10 CSR 20-6.010, as that regulation is interpreted by the director of the Department of Natural Resources. It is our further opinion that Sections 204.006 to 204.141, RSMo 1978, provide adequate authority to enforce any general permit issued pursuant to state law.

This opinion, which I hereby approve, was prepared by my assistant, Dan Summers.

Very truly yours,



JOHN ASHCROFT  
Attorney General

Enclosures: Opinion No. 235 - 1974  
Opinion No. 255 - 1974  
Opinion No. 156 - 1976

AMBULANCE DISTRICTS:  
CITIES, TOWNS & VILLAGES:  
COUNTY COURT:  
JAILS:  
PRISONERS:

Cities or counties must provide necessary medical care for persons in their legal custody. Such cities and counties are responsible for the initial payment for necessary medical

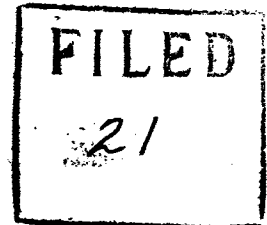
services when such payment is required prior to medical care being provided. Ambulance services are not required to furnish prisoners non-emergency transportation.

September 27, 1982

Note: See City of Revere v. Massachusetts General Hospital, 51 U.S.L.W. 5008 (decided 6-27-83).

OPINION NO. 21

The Honorable Emory Melton  
Senator, District 29  
Room 419C, Capitol Building  
Jefferson City, Missouri 65101



Dear Senator Melton:

This letter is in response to your questions asking:

1. What duty does a law enforcement agency (city or county) have regarding medical attention for a person in legal custody; i.e., under arrest or incarcerated?
2. Who is responsible for initial payment for emergency treatment and transportation of the person in custody?
3. What duty does an ambulance service have to transport a prisoner when:
  - a. the illness is non-life-threatening and no payment can be expected; or
  - b. the agency with custody of the person refuses to send an accompanying officer with the ambulance?
4. In the event a prisoner is transported by an ambulance service and, en route, without the accompanying officer, the prisoner becomes violent injuring an ambulance crew member or is himself injured, who then is responsible for damages?

The Honorable Emory Melton

You further state:

Prisoner in the jail of County A becomes ill. The sheriff calls an ambulance to transport the prisoner to hospital. The sheriff does not send a deputy with the prisoner who, en route to the hospital, becomes violent and injures an ambulance attendant.

Section 221.120, RSMo 1978, provides:

In case any prisoner confined in the jail be sick, and, in the judgment of the jailer, needs a physician or medicine, said jailer shall procure the necessary medicine or medical attention, the costs of which shall be taxed and paid as other costs in criminal cases; or the county court may, in their discretion, employ a physician by the year, to attend said prisoners, and make such reasonable charge for his service and medicine, when required, to be taxed and collected as aforesaid.

We believe Section 221.120 imposes a duty on a county jailer to procure necessary medical attention for his prisoners. We further believe that principles of constitutional law mandate that a jailer obtain necessary medical attention for his prisoners, even in the absence of a statutory requirement.

The Eighth Amendment to the United States Constitution, and Article I, Section 21, Missouri Constitution, prohibit the infliction of cruel and unusual punishment. In Estelle v. Gamble, 429 U.S. 97 (1976), the Supreme Court of the United States applied the Eighth Amendment as follows:

An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical "torture or a lingering death," . . . the evils of most immediate concern to the drafters of the [Eighth] Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. . . . The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codi-

The Honorable Emory Melton

ifying the common-law view that "It is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty care for himself." [citations omitted.]

We believe the duty to provide necessary medical care imposed under the Estelle rationale applies both to county jailers, who fall under the aegis of Section 221.120, and city jailers, to whom the constitutional principles apply.

We do not perceive your first question to be limited to prisoners who are serving a sentence; we believe your question extends to persons who are arrested by county or city law enforcement agencies and who need medical attention prior to incarceration.

Although we find no Missouri appellate cases in point, it is logically inconsistent for the Eighth Amendment's prohibition against cruel and unusual punishment to attach only after confinement commences. Therefore, we believe the duty to provide necessary medical attention arises the moment the person comes into police custody and extends until his discharge. See, Estelle v. Gamble, supra, Bartron Clinic v. Kallemeyn, 245 N.W. 393 (S.D. 1932); Massachusetts General Hospital v. City of Revere, 434 N.E.2d 185 (Mass. 1982); Lutheran Medical Center of Omaha v. City of Omaha, 281 N.W.2d 786 (Neb. 1979).

It is, therefore, our opinion that cities and counties must provide necessary medical care for persons in their legal custody, from the time of initial arrest until discharge.

Your second question asks who is responsible for the initial payment for emergency treatment of a person in custody. We believe your question essentially asks whether the authority in custody of a person under arrest or incarcerated must guarantee payment to a provider of medical care who refuses to perform medical services without payment in advance of rendering such services. You do not ask, nor do we opine, concerning who is ultimately responsible for payment to the provider of medical services.

The principles of constitutional law upon which we relied in response to your first question are applicable to your second question. Clearly, the duty to provide medical care to a person in custody requires that the custodial authority take all steps necessary to obtain needed care. See, Massachusetts General Hospital v. City of Revere, supra; Lutheran Medical Center of Omaha v. City of Omaha, supra; Bartron Clinic v. Kallemeyn, supra. Thus, it is our opinion that the authority maintaining custody of a person is responsible for initial payment when such payment is required prior to necessary medical care being provided.

The Honorable Emory Melton

Your third question asks what duty an ambulance service has to transport a prisoner when the prisoner's condition is non-life threatening and no payment can be expected or the custodial agency refuses to send an officer with the prisoner in the ambulance. We believe your question can be stated another way: May an ambulance service refuse to transport a prisoner, whose condition is not life threatening, because (a) no payment can be expected or (b) the custodial agency refuses to send an officer to accompany the prisoner?

Chapter 190, RSMo 1978, relates specifically to emergency services, including ambulance districts, ambulances, ambulance personnel, and emergency treatment. In that chapter, the General Assembly established a comprehensive system of licensing emergency services in Missouri. Chapter 190 does not impose a statutory duty to transport persons or prisoners upon emergency services licensees. Our review of Missouri appellate decisions discloses no rulings which impose such a duty.

Your third question clearly contemplates non-emergency transportation of prisoners. We therefore limit our response to that limited fact situation.


Because we find no statutory, constitutional or common-law duty which requires an ambulance service to transport prisoners whose illness is not life threatening, we believe that an ambulance service may refuse to provide such non-emergency transportation.

Your fourth question asks who is responsible for damages in the event a prisoner who is being transported by an ambulance without a guard becomes violent and injures an ambulance crew member or himself. It is our view that this question is much too speculative to permit an adequate answer. We therefore respectfully decline to answer your fourth question.

#### CONCLUSION

It is the opinion of this office that cities or counties must provide necessary medical care for persons in their legal custody. Such cities and counties are responsible for the initial payment for necessary medical services when such payment is required prior to medical care being provided. Ambulance services are not required to furnish prisoners non-emergency transportation.

Very truly yours,



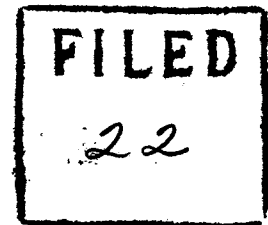
JOHN ASHCROFT  
Attorney General

HANCOCK AMENDMENT:  
CONSTITUTIONAL LAW:  
STATE REVENUES:

The proceeds received by the state in fiscal year 1981 from general obligation bonds issued by it constitute neither general nor special revenues of the state and are to be excluded from computations of total state revenue under Article X, Sections 16 to 24, Missouri Constitution.

March 22, 1982

OPINION NO. 22



The Honorable James F. Antonio  
State Auditor of Missouri  
State Capitol Building  
Jefferson City, Missouri 65101

Dear Mr. Antonio:

This is in response to your request for an opinion as follows:

If the proceeds from the sale of state water pollution control bonds are received by the state prior to the end of fiscal year 1980-81 (FY81), are the proceeds considered as part of total state revenues in FY81 for purposes of calculating the state's revenue limit for FY82 under the Hancock Amendment?

Article X, Sections 16 to 24, Missouri Constitution, comprise the Hancock Amendment. The crux of the amendment is the calculation of the ratio between total state revenues collected by state government in fiscal year 1981, on the one hand, and Missouri personal income during the year 1979, on the other. Once established, that ratio is applied in each fiscal year to determine the maximum portion of the personal income of Missourians which might be used to fund state government.

Water pollution control bonds are issued by the State of Missouri pursuant to authority granted in Article III, Section 37(b), Missouri Constitution. Such bonds are general obligation bonds.

Article X, Section 17, defines "total state revenues" in pertinent part as follows:

The Honorable James F. Antonio

"Total state revenues" includes all general and special revenues, license [sic] and fees, excluding federal funds, as defined in the budget message of the governor for fiscal year 1980-1981.

As noted by many of those who have attempted to interpret this provision, it is apparent that the referenced budget message is of little value in delineating which receipts are to be included and which excluded from the computations. Certainly there is nothing specifically informing us that general obligation bond proceeds either are or are not state revenues. In resolution of the inquiry, therefore, we are bound according to general principles of constitutional construction to ascribe to the words used in Section 17 their usual and ordinary meanings.

It is usual, we find, either to define revenue as income or to otherwise treat the terms "revenue" and "income" as synonymous. State ex rel. Thompson v. Board of Regents for Northeast Missouri State Teachers' College, 264 S.W. 698 (Mo. banc 1924); Davis v. Phipps, 85 S.W.2d 1020 (Ark. 1935); Fullerton v. Central Lincoln People's Utility Dist., 201 P.2d 524 (Ore. 1948). Both income and revenue have been held to be measures of yield or gain. Trefry v. Putnam, 116 N.E. 904 (Mass. 1917); Bates v. Porter, 15 P. 732 (Cal. 1887); Davis v. Phipps, *supra*, so as to exclude from revenue calculations receipts which could not be classed as income.

In Webb City & C. Waterworks Co. v. City of Cartersville, 43 S.W. 625 (Mo. 1897), the appellant, under contract with the city, was determined by the trial court to be entitled to payment to the extent that "income and revenue" of the city exceeded its necessary expenses. The trial court further held that proceeds received by the city from sale of its bonds were not to be included as revenue or income and the contractor appealed. Noting that the terms "income" and "revenue" encompass more than simply the sum of taxes collected, the court continued:

But this does not, we think, as insisted upon by plaintiff, include moneys arising from the sale of its bonds . . . and the fact that . . . [a portion of the proceeds] was placed by the defendant in its general expense fund does not alter the case. Income does not mean money borrowed, but in this instance means revenues derived by the city from all sources, and upon all accounts. So that no error was committed

The Honorable James F. Antonio

by the court, when estimating the annual income and revenues of the city, in excluding from its consideration moneys received from the sale of bonds issued by it, . . . Carterville, supra, at 629.

We believe that the Carterville case is sound authority requiring the exclusion of bond proceeds from total state revenues.

#### CONCLUSION

It is the opinion of this office that the proceeds received by the state in fiscal year 1981 from general obligation bonds issued by it constitute neither general nor special revenue of the state and are to be excluded from computations of total state revenue under Article X, Sections 16 to 24, Missouri Constitution.

Very truly yours,

A handwritten signature in black ink, reading "John Ashcroft". The signature is written in a cursive, slightly stylized script.

JOHN ASHCROFT  
Attorney General

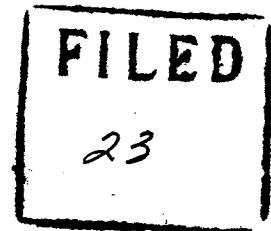
DEPARTMENT OF MENTAL HEALTH:  
MENTAL HEALTH:

The Department of Mental Health may discharge persons from its placement program pursuant to discharge procedures and criteria established in Chapters 632 and 633, RSMo Supp. 1981. An individual who meets the criteria for placement in a placement program but not the criteria for admission to facility hospitalization may not be transferred from the former to the latter. The department may not continue to serve persons in a placement program who do not qualify for such treatment.

April 5, 1982

OPINION NO. 23

Paul R. Ahr, Ph.D., M.P.A., Director  
Department of Mental Health  
2002 Missouri Boulevard  
Jefferson City, Missouri 65101



Dear Dr. Ahr:

This is in response to your request for an opinion as follows:

1. May the Department of Mental Health discharge persons from its placement program?
2. If the Department of Mental Health can discharge clients from its placement program, what criteria may the Department use to discharge the clients?
3. May a Department facility refuse to admit a placement client who does not meet facility admission criteria while continuing to meet criteria for receiving placement support and services?
4. May the Department continue to serve, through the placement program, persons who could not meet the current criteria for the placement program?

Paul R. Ahr. Ph.D., M.P.A., Director

For foundational purposes, it is necessary to examine pertinent statutory enactments relating to your question. Section 630.605, RSMo Supp. 1981, directs the department to establish a placement program "for persons affected by a mental disorder, mental illness, mental retardation, developmental disability or alcohol or drug abuse." This section allows the department to "utilize residential facilities, day programs and specialized services which are designed to maintain a person who is accepted in the placement program in the least restrictive environment in accordance with the person's individualized treatment, habilitation or rehabilitation plan." The department is further directed to "license, certify and fund, subject to appropriations, a continuum of facilities, programs and services short of admission to a department facility to accomplish this [statutory] purpose." [Emphasis added.]

Section 630.610.1, RSMo Supp. 1981, provides that a person residing in a state mental health facility may be referred for placement by the head of that facility. If the patient is accepted and placed "then the patient or resident shall be considered as discharged as a patient or resident of the facility and reclassified as a client of the department." Section 630.610.2, RSMo Supp. 1981, provides that any person, or his authorized representative if he is a minor or has been declared incompetent by a court, "may apply for placement of the person under this chapter." Section 630.610.3, RSMo Supp. 1981, states that if the department "finds the application [for placement] . . . appropriate after review, it shall provide for or arrange for a comprehensive evaluation and the preparation of an individualized treatment, habilitation or rehabilitation plan of the person seeking to be placed, . . ." to determine if specified criteria are met.

Sections 630.615 through 630.660, RSMo Supp. 1981, detail the criteria for admitting an individual to a placement program, the procedure by which such a placement is to be effectuated, and matters pertaining or relating thereto.

The genesis of your opinion request appears to be the fact that while Sections 630.605 through 630.660, RSMo Supp. 1981, provide detailed procedures for transferring a patient from a state mental health facility to a placement program, these sections do not establish necessary steps for discharging a person from the placement program.

We note that there are statutory provisions relating to the discharge of patients from state mental health facilities and from state mental retardation facilities. Section 632.150, RSMo Supp. 1981, provides that a voluntary patient at a state mental health

Paul R. Ahr, Ph.D., M.P.A., Director

facility may request his own release and "shall be released immediately; . . . [unless] the head of the facility determines that he is mentally disordered and, as a result, presents a likelihood of serious physical harm to himself or others, . . ." See also, Section 632.155, RSMo Supp. 1981, (release of voluntary minor patients).

Section 632.175.1, RSMo Supp. 1981, states that the head of each mental health facility shall review each patient at least every 180 days:

for the purpose of determining whether the patient needs further hospitalization or should be released. If, as a result of such review, it is determined that inpatient care, treatment and rehabilitation are no longer appropriate, the head of the facility shall discharge, or initiate proceedings to discharge, the patient. If a patient meets the criteria for placement, the head of the facility shall refer him for placement.

Section 633.125.1, RSMo Supp. 1981, provides that a resident admitted to a mental retardation facility:

shall be discharged immediately when the person who applied for his admission requests the release orally, in writing or otherwise from the head of the mental retardation facility; except, that if the head of the mental retardation facility regards the resident as presenting a likelihood of serious physical harm to himself or others, the head of the facility may initiate involuntary detention procedures pursuant to chapter 632, RSMo, if appropriate, or any individual, including the head of the facility or the mental health coordinator may initiate guardianship proceedings and, if appropriate, obtain an emergency commitment order pursuant to chapter 475, RSMo.

Section 633.125.2, RSMo Supp. 1981, requires that a resident of a mental retardation facility be discharged:

if it is determined in a comprehensive evaluation or periodic review that the person is not mentally retarded or developmentally disabled, and if the resident, parent, if a minor, or

Paul R. Ahr, Ph.D., M.P.A., Director

guardian consents to the discharge. If consent is not obtained, the head of the facility shall initiate appeal proceedings under section 633.135, before a resident can be discharged.

Section 633.130.1, RSMo Supp. 1981, requires that the head of each mental retardation facility review the condition and status of each resident thereof every 180 days "for the purpose of determining whether the resident needs further residential habilitation, placement in the least restrictive environment or discharge." Section 633.130.2 mandates that the head of the mental retardation facility initiate any necessary proceedings to discharge "any resident whose continued residential habilitation is no longer appropriate."

Section 633.135, RSMo Supp. 1981, sets forth, in detail, the criteria and procedure required for the discharge of a resident from a mental retardation facility when such discharge is not consented to by the resident or his authorized legal representative.

In O'Connor v. Donaldson, 422 U.S. 563, 45 L.Ed.2d 396, 95 S.Ct. 2486 (1975), the United States Supreme Court concluded that a state may not confine in a mental health facility even the mentally ill if they are not dangerous and if they can live safely in freedom. See also, Parham v. J.R., 422 U.S. 584, 61 L.Ed.2d 101, 99 S.Ct. 2493 (1979).

In response to your first two questions, we conclude that the department may discharge persons from its placement program; the criteria to be used in determining when discharge from such programs is appropriate is found in the applicable statutes in Chapter 632 and 633, RSMo Supp. 1981. We find that Chapters 630 through 633 comprehensively and completely deal with the mental health system of this state. Consequently, these chapters are to be read together. Although there is no specific provision for discharge found in the placement program sections of Chapter 630, we believe the discharge provisions found in Chapters 632 and 633 establish the necessary procedures and criteria to be used in discharging a person from a placement program. We believe that the absence of discharge procedure provisions in Chapter 630 relating to placement programs was not an omission on the part of the legislature, but rather an indication that the applicable discharge provisions of Chapters 632 and 633 were to apply.

In response to question three, we find that a department facility may refuse to admit a placement client who does not meet facility admission criteria while continuing to meet criteria for receiving placement support and services. Axiomatically, placement

Paul R. Ahr, Ph.D., M.P.A., Director

programs, which are generally residential facilities, provide a less restrictive environment for those in need of state mental health services than a department facility. The statutes make it clear that the criteria for placement are different than the criteria for admission to a department facility. Cf. Sections 630.610, 632.105 and 633.120.

Section 630.605, RSMo Supp. 1981, provides:

The department shall establish a placement program for persons affected by a mental disorder, mental illness, mental retardation, developmental disability or alcohol or drug abuse. The department may utilize residential facilities, day programs and specialized services which are designed to maintain a person who is accepted in the placement program in the least restrictive environment in accordance with the person's individualized treatment, habilitation or rehabilitation plan. The department shall license, certify and fund, subject to appropriations, a continuum of facilities, programs and services short of admission to a department facility to accomplish this purpose. [Emphasis added.]

Since Missouri law requires an individual to be treated in the least restrictive environment, and the criteria for admission to a placement program are different from the criteria for admission to a department facility, if an individual meets the criteria for admission to a placement program, and not a department facility, the department may refuse to admit such an individual to a facility while caring for him in a placement program.

In response to your final question, we believe that the department may not continue to serve, on a residential basis, persons who do not meet the current criteria for placement programs. We emphasize, in responding to this question, that we assume that prior to any discharge the appropriate professionals must determine that such discharge is consistent with the applicable discharge statutes.

#### CONCLUSION

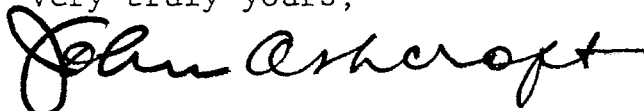
It is our opinion that the Department of Mental Health may discharge persons from its placement program pursuant to discharge procedures and criteria established in Chapters 632 and 633, RSMo Supp. 1981.

Paul R. Ahr., Ph.D., M.P.A., Director

It is further our opinion that an individual who meets the criteria for placement in a placement program but not the criteria for admission to facility hospitalization may not be transferred from the former to the latter.

Finally, it is our opinion that the Department of Mental Health may not continue to serve persons in a placement program who do not qualify for such treatment in accordance with Section 630.610, RSMo Supp. 1981.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft". The signature is fluid and cursive, with a large initial "J" and a stylized "A".

JOHN ASHCROFT  
Attorney General

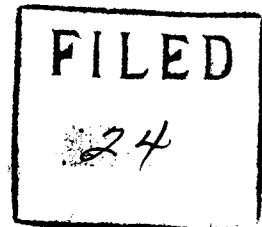
DIVISION OF INSURANCE:  
WORKERS' COMPENSATION:  
SECOND INJURY FUND:  
OFFICE OF ADMINISTRATION:

The Office of Administration must pay a workers' compensation assessment assessed by the director of the Division of Insurance pursuant to Sec-

tion 287.730, RSMo 1978, the Office of Administration must file a return with the director of the Division of Insurance similar to that required by Section 287.710, RSMo Supp. 1981, and the Office of Administration is required to pay the Second Injury Fund assessment established in Section 287.715, RSMo 1978.

March 25, 1982

OPINION NO. 24



C. Donald Ainsworth, Director  
Missouri Division of Insurance  
515 East High Street  
Jefferson City, Missouri 65101

Dear Mr. Ainsworth:

This opinion is in response to the following questions:

1. Is the Missouri Office of Administration, a state agency, required to pay the Workmen's Compensation tax pursuant to Sections 287.730 and 287.690, RSMo 1978?
2. Is the Missouri Office of Administration, a state agency, required to on or before the first day of March of each year file a return with the Director of the Division of Insurance pursuant to Section 287.710, RSMo 1978?
3. Is the Missouri Office of Administration also required to pay the Second Injury Fund assessment pursuant to Section 287.715, RSMo 1978?

For purposes of discussion, we note that the Workers' Compensation Law applies to all state employees. See, Sections 105.810 and 105.830, RSMo 1978. A state employee is defined as "any person who is an elected or appointed official of the state of Missouri or who is employed by the state and earns a salary or wage in a

C. Donald Ainsworth, Director

position normally requiring the actual performance by him of duties on behalf of the state." Section 105.800, RSMo 1978. The term "employer" is defined in the Workers' Compensation Law to include the State of Missouri. Section 287.030.1(2), RSMo Supp. 1981. If an employer subject to the Workers' Compensation Law elects to become self-insured, its liability under Chapter 287 becomes direct and primary. Section 287.300, RSMo 1978. The Missouri General Assembly expressly provided the State of Missouri with the option of becoming a self-insurer and assuming the liability imposed by Chapter 287, RSMo. See, Section 105.810, RSMo 1978. For purposes of this opinion, we assume that your questions are limited to instances in which the Office of Administration is acting on behalf of state agencies which have elected to be self-insured for purposes of the Workers' Compensation Law, Chapter 287, RSMo.

Your first and third questions will be discussed together since each concerns the obligations of the Office of Administration under the Workers' Compensation Law. Generally, the Office of Administration is responsible for paying the obligations and expenses incurred by state agencies. Funding for the purpose of meeting the obligations incurred by the state agencies electing to self-insure under the Workers' Compensation Law has been provided by appropriation by the General Assembly to the Office of Administration. See, for example, House Bill 5, Section 5.330, 81st General Assembly, First Regular Session (1981); Laws 1980, Section 5.335, page 31; Laws 1979, Section 5.225, page 30; Laws 1978, Section 5.245, page 28.

Section 287.730, RSMo 1978, referring to self-insurers, provides that the director of the Division of Insurance shall make an assessment "similar" to that imposed on insurance carriers under Section 287.690, RSMo 1978, to be collected from self-insurers. Section 287.715.1, RSMo 1978, requires self-insurers to pay a fractional "sum" of total compensation actually paid during the calendar year to provide revenue for the Second Injury Fund. By electing in Section 105.810, RSMo 1978, to include all state employees under the provisions of the Workers' Compensation Law, the General Assembly inferred that the state must assume its share of the cost of administration of the Workers' Compensation Law and the maintenance of the Second Injury Fund for employees of state agencies electing to self-insure. Appropriations to cover these expenses were made by the General Assembly. Therefore, in response to questions 1 and 3, the Office of Administration is required to pay the workers' compensation assessment assessed pursuant to Section 287.730, RSMo 1978, and to pay its share of maintaining the Second Injury Fund pursuant to Section 287.715, RSMo 1978.

C. Donald Ainsworth, Director

With regard to your second question, we conclude that the Office of Administration must file an annual return with the Division of Insurance. Although the mandate to file a return contained in Section 287.710, RSMo Supp. 1981, refers only to the "insurance carrier," and not to the self-insured employer, we believe Section 287.730, infers that the self-insured employer, including state agencies, must fulfill the necessary procedural requirements prior to assessment including the filing of a return with the director of the Division of Insurance.

The provisions of Chapter 287 should be liberally construed with a view towards the public welfare. Section 287.800, RSMo 1978. Section 287.710, RSMo Supp. 1981, demonstrates the legislature's concern with the method of reporting to the director of the Division of Insurance by insurance carriers so that proper assessments can be made to fund the expense of administering Chapter 287 and maintaining the Second Injury Fund. Some method of reporting by self-insurers is also necessary to meet the mandates of the law and protect employees effectively. The filing of a return with the director of the Division of Insurance is a necessary precondition to the assessment of the contribution from self-insured employers. This construction, consistent with the obvious legislative intent, requires the Office of Administration to file a return with the director of the Division of Insurance.

#### CONCLUSION

It is the opinion of this office that the Office of Administration must pay a workers' compensation assessment assessed by the director of the Division of Insurance pursuant to Section 287.730, RSMo 1978, the Office of Administration must file a return with the director of the Division of Insurance similar to that required by Section 287.710, RSMo Supp. 1981, and the Office of Administration is required to pay the Second Injury Fund Assessment established in Section 287.715, RSMo 1978.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Steven H. Akre.

Very truly yours,



JOHN ASHCROFT  
Attorney General

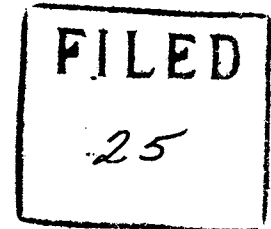
COMPENSATION:  
CONSTITUTIONAL LAW:  
OFFICERS:  
STATE TAX COMMISSION:

Pursuant to the provisions of Article VII, Section 13, Missouri Constitution, no member of the State Tax Commission was entitled to the increase in compensation provided for such members under House Bill 841 or House Committee Substitute for House Bill 77, 79th General Assembly, First Regular Session, until he assumed a new term of office.

October 8, 1982

OPINION NO. 25

The Honorable James F. Antonio  
State Auditor of Missouri  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Dr. Antonio:

This opinion is in response to your question asking:

On what date was each member of the State Tax Commission entitled to the increase in compensation provided by H.B. 841 and H.C.S.H.B. 77, 79th General Assembly, First Regular Session?

The bills passed by the General Assembly to which you refer repealed Section 138.230, RSMo 1969, which had provided that the compensation to be paid to each member of the State Tax Commission was \$8,000 per year; each of the bills to which you refer enacted a new Section 138.230 raising the compensation to be paid each State Tax Commissioner to \$15,000 per annum. House Bill 841, by its own terms, took effect January 1, 1978. House Committee Substitute for House Bill 77 became effective September 28, 1977.

Pursuant to Section 138.190, RSMo 1978, the State Tax Commission is composed of three commissioners, appointed by the governor, who hold office for staggered six-year terms. You have informed us that the terms of the commissioners expired January 23, 1978, January 23, 1980, and January 23, 1982.

Article VII, Section 13, Missouri Constitution, provides:

The Honorable James F. Antonio

The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended.

Our initial inquiry must be whether the members of the State Tax Commission are state officers who fall within the provisions of Article VII, Section 13. In State ex rel. Webb v. Pigg, 249 S.W.2d 435 (Mo. 1952), the Supreme Court established the test to determine whether a person is a state officer within the meaning of Article VII, Section 13.

In order to be considered a "state officer" within the purpose and meaning of said constitutional provision, the official in question must have been delegated a portion of the sovereign power of government to be exercised for the benefit of the public and such delegation of sovereign power must be "substantial and independently exercised with some continuity and without control of a superior power other than the law." [citations omitted] Id. at 438.

It is clear from the provisions of Sections 138.380, 138.390 and 138.420, that the State Tax Commission possesses the power and authority to employ its own judgment and discretion in discharging the sovereign functions of the government, particularly with regard to the establishment of tax assessments as more fully set out in Chapter 138. In addition, Section 138.190 provides:

The director of revenue shall have no supervision, authority or control over such actions or decisions of the state tax commission as relates to its duties prescribed by law. . . .

We believe that commissioners of the State Tax Commission are state officers within the meaning of Article VII, Section 13. We, therefore, conclude that since such commissioners come within the prohibition of Article VII, Section 13, no member of the commission is eligible to receive an increase in compensation until he undertakes a new term.

#### CONCLUSION

It is the opinion of this office that because of the provisions of Article VII, Section 13, Missouri Constitution, no member of the

The Honorable James F. Antonio

State Tax Commission was entitled to the increase in compensation provided for such members under House Bill 841 or House Committee Substitute for House Bill 77, 79th General Assembly, First Regular Session, until he assumed a new term of office.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, flowing script.

JOHN ASHCROFT  
Attorney General

CITIES, TOWNS, AND VILLAGES:  
RECREATION AND RECREATIONAL GROUNDS:  
CONSTITUTIONAL LAW:  
RELIGION:

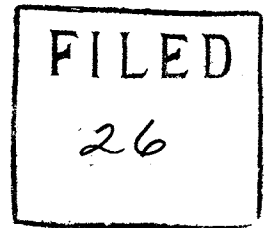
An incorporated village  
may construct recreational  
facilities such as outdoor  
basketball or tennis courts  
with village funds and may

lease property for this purpose from a church or not-for-profit  
civic organization.

February 1, 1982

OPINION NO. 26

The Honorable Jeff W. Schaeperkoetter  
Representative, District 120  
Room 115C, State Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Schaeperkoetter:

This opinion is in response to your question,

Does Section 80.090 RSMo 1978, or any other  
constitutional or statutory provision either  
authorize or prohibit a village to construct  
recreational facilities such as outdoor  
basketball or tennis courts on real estate  
owned by either a church or a not-for-profit  
civic organization, if the village is able  
to secure a long-term lease of the property.

You have informed us that,

Several towns and villages in my district  
are accumulating sales tax funds and have  
no real estate on which to construct [sic]  
recreational facilities. Available land  
is often possessed by churches or civic  
organizations.

In 1961, the General Assembly enacted Sections 67.750 through  
67.780, entitled "Recreational Systems of Political Subdivisions."  
In these sections, the General Assembly expressly granted the  
governing body of a "political subdivision," as defined in Section  
67.750(3), authority to establish a system of public recreation.  
Specifically, Section 67.755.1, RSMo 1978, provides:

The Honorable Jeff W. Schaeperkoetter

The governing body of any political subdivision may provide, establish, equip, develop, operate, maintain and conduct a system of public recreation including parks and other recreational grounds, playgrounds, recreational centers, swimming pools, and any and all other recreational areas, facilities and activities, and may do so by purchase, gift, lease, condemnation, exchange or otherwise, and may employ necessary personnel. Funds to be spent for such purposes may be set up in their respective budgets by any governing body.

In view of this clear, unambiguous expression of legislative intent, we conclude that incorporated villages in Missouri may construct recreational facilities such as outdoor basketball or tennis courts and may lease property for that purpose.

Two sections of the Missouri Constitution prohibit the grant of state funds in aid to religious organizations. Article I, Section 7, Missouri Constitution (1945), provides:

That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

Article IX, Section 8, Missouri Constitution (1945), provides:

Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall

The Honorable Jeff W. Schaeperkoetter

any grant or donation of personal property  
or real estate ever be made by the state,  
or any county, city, town, or other municipal  
corporation, for any religious creed, church,  
or sectarian purpose whatever.

In Kintzele v. City of St. Louis, 347 S.W.2d 695 (Mo. banc 1961), the plaintiffs contended that the sale of land under the Land Clearance for Redevelopment Law (Sections 99.300 to 99.660, RSMo 1959) to a private school violated the state constitutional prohibitions cited above. The Missouri Supreme Court rejected this contention, holding, "[S]ince this sale is an exchange of considerations and not a gift or subsidy, no 'aid to religion' is involved and a religious corporation cannot be excluded from bidding." . . . Id. at 700, quoting 64th St. Residences, Inc. v. City of New York, 4 N.Y.2d 268, 174 N.Y.S.2d 1, 4, 150 N.E.2d 396 (1958), cert. denied 357 U.S. 907, 78 S.Ct. 1152, 2 L.Ed.2d 1157 (1958). See also Opinion No. 56, Burch, (1970).

We believe the rationale employed in the Kintzele case applies to your question. Assuming that any lease of property from a church is entered into in good faith and for fair consideration following arm's-length negotiations, we believe that such a lease is an exchange of considerations, is not a gift or subsidy, and not an "aid to religion" in violation of the cited provisions of the Missouri Constitution.

Nor do we believe that such a lease would violate the establishment clause [Amendment I] of the United States Constitution. In School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844, 858 (1963), the Supreme Court of the United States outlined a test to be applied in determining whether a proposed activity violates the establishment clause:

The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. . . .

The Honorable Jeff W. Schaeperkoetter

We see no basis to support a contention that the purpose and primary effect of a village leasing property for municipal recreational purposes from a church is to advance religion.

We add two caveats: First, because Article I, Section 7, and Article IX, Section 8, Missouri Constitution (1945), are explicit regarding issues of church and state, guarding against public funds being used to benefit religion, extraordinary care should be exercised in any lease to provide that improvements to any real property owned by a church or other religious organization be severable to the greatest extent possible or that the residual value of any such improvements made be considered as part of the consideration for the lease.

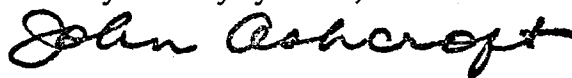
Second, you should be aware of the limitations contained in Article VI, Section 26(a), Missouri Constitution (1945), that concern the permissible length of leases. See Ebert v. Jackson County, 70 S.W.2d 918 (Mo. 1934). We attach for your information two opinions of this office dealing with this issue: Opinion No. 304, Kiser (1965); Opinion No. 88, O'Halloran (1974).

#### CONCLUSION

It is the opinion of this office that an incorporated village may construct recreational facilities such as outdoor basketball or tennis courts with village funds and may lease property for this purpose from a church or not-for-profit civic organization.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Charles R. Miller.

Very truly yours,



JOHN ASHCROFT  
Attorney General

Enclosures: Opinion No. 56 (1970)  
Opinion No. 304 (1965)  
Opinion No. 88 (1974)

AIRCRAFT TAXATION:  
COMPENSATION:  
COUNTIES:  
COUNTY COLLECTORS:  
TAXATION:  
UTILITIES:

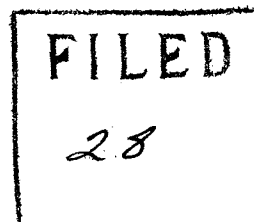
Utility and aircraft taxes are local taxes within the provisions of Section 52.260, RSMo, and are subject to the collection fee provided for therein. Such fees, when collected by a second class county collector who is paid a

salary, must be paid to the county treasury pursuant to Section 50.350, RSMo.

December 13, 1982

OPINION NO. 28

The Honorable Kenneth D. Hassler  
Prosecuting Attorney, Platte County  
Post Office Box B  
Platte City, Missouri 64079



Dear Mr. Hassler:

This opinion is in response to your question asking whether the Collector of Platte County, a second class county, should collect a one percent commission on utility and aircraft taxes to be turned into the county general revenue fund.

Your question arises because of the holdings of the Missouri Supreme Court in Felker v. Carpenter, 340 S.W.2d 696 (Mo. 1960), and American Airlines, Inc. v. City of St. Louis, 368 S.W.2d 161 (Mo. 1963).

Section 151.280, RSMo, with respect to railroad taxes provides:

The county collector shall be allowed for collecting the railroad taxes, payable out of the same, one percent on all sums paid without seizure of personal property; and on all collections made by seizure of personal property, he shall be allowed five percent on the amount, which shall be taxed or charged as costs and paid by the railroad company; and on all collections made by suit against such company or companies two percent on the amount, to be paid as costs by the defendant; provided, that in all counties of class one and the city of

The Honorable Kenneth D. Hassler

St. Louis the collector shall pay such fees into the county or city treasury as provided by law.

Section 153.030, RSMo, with respect to bridge and utility companies provides, in pertinent part:

2. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state,

. . .

Section 155.060, RSMo, with respect to aircraft taxes provides, in pertinent part:

Taxes levied on all aircraft under this chapter shall be levied and collected in the manner provided for the taxation of railroad property, . . .

Felker v. Carpenter, id., in our view concerned only whether the collector of revenue was entitled to retain one percent of utility taxes collected by him in addition to the maximum amount of compensation payable to him under Section 52.270, RSMo. The court concluded that Section 153.030 with respect to utility taxes referred only to the method provided in Section 151.280 for the levy and collection of railroad taxes and did not deal or purport to deal with the subject of compensation to the collector for collecting those taxes. American Airlines, Inc. v. City of St. Louis, id., followed the holding of Felker v. Carpenter with respect to the provisions of Section 155.060, respecting airline taxes and concluded that Section 155.060 does not inferentially make provision for or direct the collection of such a collector's fee. Neither case considered the applicability of the present provisions of Section 52.260, RSMo, which provides that the collector shall retain a certain commission for collecting certain taxes, including "all other local taxes". However, in our Opinion No. 14, dated January 14, 1954, to Campbell, copy enclosed, Attorney General John M. Dalton, who was also counsel in the case of Felker v. Carpenter, concluded that the collector should include utility taxes in the calculation of the collector's commissions under Section 52.260. Accordingly, we conclude that the collection of utility taxes and aircraft taxes comes within the provisions of Section 52.260.

Under Section 50.350, RSMo, such fees when collected by the collector, who is a salaried officer in a second class county, are

The Honorable Kenneth D. Hassler

payable to the county treasury. See Opinion No. 72, dated April 11, 1956, to Pratt, copy enclosed.

CONCLUSION

It is the opinion of this office that utility and aircraft taxes are local taxes within the provisions of Section 52.260, RSMo, and are subject to the collection fee provided for therein. Such fees, when collected by a second class county collector who is paid a salary, must be paid to the county treasury pursuant to Section 50.350, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT  
Attorney General

Enclosures:

Opinion No. 14 (1-14-54)

Opinion No. 72 (4-11-56)

*Attorney General of Missouri*

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT  
ATTORNEY GENERAL

(314) 751-3321

October 25, 1982

OPINION LETTER NO. 29

The Honorable James F. Antonio  
State Auditor  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Dr. Antonio:

This letter is in response to your question asking on what date each member of the State Board of Probation and Parole is legally permitted to receive an increase in compensation as a result of the enactment of Senate Bill 418, 80th General Assembly, First Regular Session.

The bill to which you refer repealed Sections 549.205, 549.211, 549.215, 549.217 and 549.219, RSMo 1978, and purported to repeal Section 549.218, all relating to the State Board of Probation and Parole, and enacted in lieu thereof a new Section 549.205, with an emergency clause which provided that the bill would be effective upon its passage and approval. The bill was approved August 1, 1979.

Because of a technical defect in Senate Bill 418, the General Assembly enacted a revision in House Bill 1529 in the Second Regular Session, 80th General Assembly, which also provided for the repeal of Section 549.218.

Repealed Sections 549.215, 549.217, 549.218 and 549.219 provided for an aggregate compensation of \$27,000 a year for the chairman of the State Board of Probation and Parole and \$24,000 for each member. Subsection 9 of Section 549.205, as amended (now Section 549.205, RSMo Supp. 1980), provides:

The Honorable James F. Antonio

The compensation for each member of the board shall be the same and shall be set by the director of the department of social services within the limits of the appropriation. The chairman shall receive in addition to the compensation as a member of the board, twenty-five hundred dollars per year for his duties as chairman. The members shall be entitled to reimbursement for necessary travel and other expenses incurred in the performance of their official duties.

It seems clear that subsection 9 of Section 549.205 was intended to provide for the total compensation for the members and the chairman irrespective of any possible technical defect or delay in the repeal of Section 549.218.

Article VII, Section 13, Missouri Constitution, provides:

The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended.

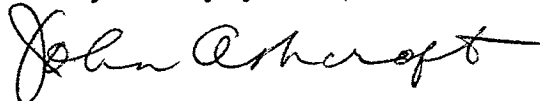
In our Opinion No. 3 (1957), we concluded that the members of the State Board of Probation and Parole are state officers within the provisions of Article VII, Section 13, Missouri Constitution, and, therefore, increases in compensation during their terms of office are prohibited. We are of the view that that opinion is still valid and is applicable here.

We think that it is vital that in order to sustain increases in compensation as an exception to Article VII, Section 13, Missouri Constitution, the statute in question must clearly indicate a legislative intent that the increase in compensation is for additional duties required to be performed by such officers which were not previously germane to the office. Mooney v. County of St. Louis, 286 S.W.2d 763 (Mo. 1956). There is no indication in Section 549.205 that the legislature intended that such new duties, if any, would form the basis for an increase in compensation. Indeed, it is clear that the provisions of subsection 9 of Section 549.205 require that the compensation of each member of the board shall be the same and shall be set by the director of the department of social services within the limits of the appropriation and that the chairman shall receive an additional \$2,500 per year. Clearly, no increase in compensation, if any, is based on any new duties required by Section 549.205.

The Honorable James F. Antonio

Pursuant to the provisions of Article VII, Section 13 of the Missouri Constitution and in the absence of the imposition of new duties for which additional compensation is expressly provided, an increase in the compensation of members of the State Board of Probation and Parole would not take effect until the beginning of a new term of office for such member.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John Ashcroft".

JOHN ASHCROFT  
Attorney General

GOVERNOR:  
DEPARTMENT OF PUBLIC SAFETY:  
MILITARY:  
ADJUTANT GENERAL:  
NATIONAL GUARD:

An executive order of the governor is required to direct the organization of the Missouri reserve military force.

October 18, 1982

OPINION NO. 30



Edward Daniel, Director  
Department of Public Safety  
621 East Capitol  
Jefferson City, Missouri 65101

Dear Mr. Daniel:

This is in response to your request for an opinion asking the following question:

Can the Director of the Department of Public Safety direct the organizing of the Missouri reserve military force or must it be done by an executive order of the Governor?

For the reasons set forth herein, we believe that the organization of the reserve military force can only be done by an executive order of the governor.

Article IV, Section 6, Missouri Constitution, provides:

The governor shall be the commander in chief of the militia, except when it is called into the service of the United States, and may call out the militia to execute the laws, suppress actual and prevent threatened insurrection, and repel invasion.

The Constitution clearly contemplates that the governor shall exercise authority to control the militia.

Chapter 41, RSMo, implements the provisions of Article IV, Section 6, Missouri Constitution. Pertinent to your opinion request, Section 41.040, RSMo 1978, provides:

Edward Daniel, Director

The militia of the state of Missouri, which includes the adjutant general and his office, constitutes the military division of the executive department of the state government, under the direct control of the governor. [Emphasis added.]

Section 41.070.2, RSMo 1978, provides, in pertinent part:

The organized militia shall consist of the following:

\* \* \*

(3) Missouri reserve military force, when organized.

Section 41.080.3, RSMo 1978, provides, in pertinent part:

The reserve military force when organized shall be of the strength and composition prescribed by the governor, . . . [Emphasis added.]

Section 41.490, RSMo 1978, provides:

The governor shall have the power to organize from the unorganized militia of Missouri a reserve military force for duty within or without the state to supplement the Missouri national guard or replace it when it is mobilized in federal service. . . . The governor shall prescribe the strength and composition of the various units of the same, uniform and insignia and the qualifications of its members, and shall have the power to grant a discharge therefrom for any reason deemed by him sufficient. [Emphasis added.]

As you indicate, Section 11.10 of the Omnibus State Reorganization Act of 1974 (Appendix B, RSMo 1978), provides:

The office of adjutant general and the state militia are assigned to the department of public safety; provided however nothing herein shall be construed to interfere with

Edward Daniel, Director

the powers and duties of the governor as provided in Article IV, Section 6 of the Constitution of the state of Missouri or chapter 41, RSMo. [Emphasis added.]

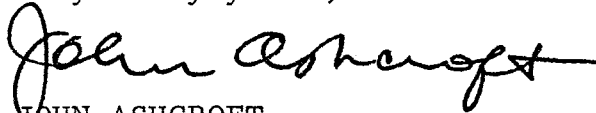
The clear mandate of the cited section of the Omnibus State Reorganization Act that such reorganization does not interfere with the constitutional and statutory duties of the governor leads us to the conclusion that it is only the governor who may direct the organizing of the Missouri reserve military force. A contrary conclusion would violate the clear expression of legislative intent contained in Section 11.10 above cited.

#### CONCLUSION

It is the opinion of this office that an executive order of the governor is required to direct the organization of the Missouri reserve military force.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Lew A. Kollias.

Very truly yours,



JOHN ASHCROFT  
Attorney General

AMBULANCE DISTRICTS:  
ANNEXATION ELECTIONS:  
ELECTION EXPENSE AND EXPENDITURES:  
COUNTY COURT:  
COUNTY ELECTIONS:

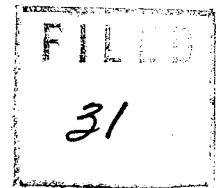
Sections 115.063, RSMo 1978,  
and 115.065, RSMo Supp. 1981,  
require that the costs of an  
election for annexation of  
land to an ambulance district  
be borne by the county court  
which submits the question  
to the voters pursuant to  
Section 190.070, RSMo 1978.

Compare Section 67.940, RSMo  
Supp. 1984.

January 14, 1982

OPINION NO. 31  
(corrected)

Mr. Kenneth L. Oswald  
Prosecuting Attorney  
Courthouse Annex  
Tuscumbia, Missouri 65082



Dear Mr. Oswald:

This opinion is in response to your request which asks the following question:

Who pays the election costs where an election is held on the question of annexation of land to an Ambulance District pursuant to Section 190.070, RSMo, 1978?

Section 190.070, RSMo 1978, establishes the procedure for the annexation of land to an ambulance district. Subsection 1 provides:

A petition for annexation of land to an ambulance district shall be signed by not less than ten percent or fifty voters, whichever is fewer, residing within the territory therein described proposed for annexation and shall be filed with the county clerk of the county in which the district or the greater portion thereof is situated, and shall be addressed to the judges of the county court. A hearing shall be held thereon as nearly as possible as in the case of a formation petition. If upon the hearing the judges of the county court find that the petition is in compliance with the provisions of sections 190.005 to 190.085, they shall order the question to be submitted to the voters within the territory and within the district. [Emphasis added.]

Mr. Kenneth L. Oswald

Section 115.063, RSMo 1978, provides:

When any question or candidate is submitted to a vote by any political subdivision or special district and no other question or candidate is submitted at the same election, all costs of the election shall be paid from the general revenue of the political subdivision or special district submitting a question or candidate at the election.

Section 115.065, RSMo Supp. 1981, provides:

1. Except as provided in sections 115.067, 115.069, 115.071, and 115.073, when any question or candidate is submitted to a vote by two or more political subdivisions or special districts at the same election, all costs of the election shall be paid proportionally from the general revenues of all political subdivisions and special districts submitting a question or candidate at the election, except that costs of publications of legal notice of elections shall not be paid proportionally. Each political subdivision and each special district shall pay for publication of its legal notice of election.

2. Proportional election costs paid under the provisions of subsection 1 of this section and section 115.067 shall be assessed by charging each political subdivision and special district the same percentage of the total cost of the election as the number of registered voters of the political subdivision or special district on the day of the election is to the total number of registered voters on the day of the election, derived by adding together the number of registered voters in each political subdivision and special district submitting a question or candidate at the election.

The statutory language is clear and unambiguous. The political subdivision or special district submitting the question to the voters is either solely responsible (Section 115.063) or proportionally responsible (Section 115.065) for the costs of the election. Because it is the county court which orders the question submitted to the voters (Section 190.070), if a petition

Mr. Kenneth L. Oswald

for annexation of land to an ambulance district complies with the provisions of Sections 190.005 to 190.085, RSMo 1978, it is our opinion that the county court is to pay for the costs of the election as the political subdivision submitting the question.

Our opinion herein is consistent with our prior Opinion No. 416, Knudsen, 1963, and Opinion Letter No. 75, Gallego, 1974, copies of which are enclosed for your reference.

Finally, we call your attention to Section 115.067, RSMo 1978. We believe that an election on the question of annexation of land into an ambulance district is a special question. If the annexation question is submitted to the voters by the county court on the same day a political subdivision or special district other than the county is holding a regularly scheduled election, the provisions of Section 115.067 would require that the costs of the annexation election be paid by the political subdivision or special district holding the regularly scheduled election.

#### CONCLUSION

It is the opinion of this office that Sections 115.063, RSMo 1978, and 115.065, RSMo Supp. 1981, require that the costs of an election for annexation of land to an ambulance district be borne by the county court which submits the question to the voters pursuant to Section 190.070, RSMo 1978.

This opinion, which I hereby approve, was prepared by the Deputy Attorney General, Edward D. Robertson, Jr.

Very truly yours,



JOHN ASHCROFT  
Attorney General

Enclosure: Opinion No. 416 (1963)  
Opinion Letter No. 75 (1974)

CART (COUNTY AID ROAD TRUST FUND):  
SPECIAL ROAD DISTRICTS:  
ROAD AND BRIDGES:  
COUNTIES:

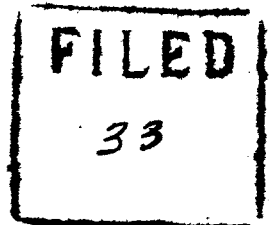
A county court, pursuant to a plan adopted in accordance with Section 231.441, RSMo, may require special road districts to provide matching

funds in actual dollars or otherwise, in order to receive CART funds from the county in which the special road district is located.

February 26, 1982

OPINION NO. 33

Honorable Walt Mueller  
Representative, District 93  
17 East Glenwood  
Kirkwood, MO 63122



Dear Representative Mueller:

This opinion is in response to your question:

Does a county court have authority under the "County Aid Road Trust" constitutional and statutory provisions, to require special road districts, or township road districts in the township organization counties, to furnish matching funds in actual dollars or otherwise in construction or work of any kind on the roads, in order to receive these CART funds under the CART fund program?

We assume that by "County Aid Road Trust" you refer to the apportionment of motor vehicle fuel tax revenues mandated by Article IV, Section 30(a).1, Missouri Constitution (as amended 1979).<sup>1</sup> The constitutional provision creates a plan whereby the revenues generated by a tax "upon or measured by fuel used for propelling highway motor vehicles" are apportioned between the counties, cities, and state. The plan may be summarized as follows:

1. Ten percent of the tax proceeds remaining after certain deductions is placed in a special trust fund known as the "County

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<sup>1</sup>The 1979 amendments to Article IV, Section 30(a), changed the funding percentages for the fund. However, the essential provisions of the Constitution with regard to the use of the fund remain unchanged from the provisions of the original Article IV, Section 30 (a), adopted by the people in 1962.

Honorable Walt Mueller

Aid Road Trust Fund." Amounts from this fund are credited to the various counties according to the following formula:

One-half on the ratio that the county road mileage of each county bears to the county road mileage of the entire state as determined by the last available report of the state highways and transportation commission and one-half on the ratio that the rural land valuation of each county bears to the rural land valuation of the entire state as determined by the last available report of the state tax commission, except that county road mileage in incorporated villages, towns or cities and the land valuation in incorporated villages, towns or cities shall be excluded in such determination, except that, if the assessed valuation of rural lands in any county is less than five million dollars, the county shall be treated as having an assessed valuation of five million dollars.

Fifteen percent of the remaining net tax proceeds is allocated to incorporated Missouri cities, towns, and villages having a population of more than 100 inhabitants. All remaining net proceeds are allocated to the state.

2. Those funds credited to each county are required to be used by the county "solely for the construction, reconstruction maintenance, and repairs of roads, bridges and highways." Article IV, Section 30(a).1(1), Missouri Constitution (as amended 1979). Unless other provisions and restrictions are imposed by law, the Highways and Transportation Commission must prescribe policy, rules, and requirements for the expenditure of these funds. Id.

Pursuant to its constitutional prerogative, the General Assembly provided other provisions and restrictions in Section 231.441, RSMo.<sup>2</sup> That section provides,

1. All moneys received by a county from the county aid road trust fund shall be used within the county solely for the construction, reconstruction, maintenance and repairs of roads, bridges and highways as the county court shall direct. The county court shall formulate by written regulations, rules and policies for the use of such funds which shall be

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<sup>2</sup>All statutory references are to RSMo 1978 unless otherwise specified.

Honorable Walt Mueller

kept on file by the county recorder for public inspection. The state [highways and transportation] commission shall have no authority to promulgate rules and regulations concerning the expenditure of such funds and all such rules and regulations heretofore promulgated shall be null and void.

2. The state treasurer by the tenth day of each month shall remit to the county treasurer of each county its allocated share of the county aid road trust fund.

Section 231.441 clearly requires county courts to formulate written rules and policies governing the expenditure of CART funds.

You have informed us that,

Board members of a special road district are told by the presiding judge of the county what repairs will be made on the road supported by the special road district fund and the amount of money the special road district must pay. If they do not wish to comply, they are not recognized for state funds the following year.

For purposes of this opinion only, we assume that the presiding judge of the county is acting pursuant to a plan promulgated by the county, as required by Section 231.441, RSMo.

Careful examination of Article IV, Section 30(a), Missouri Constitution (as amended 1979), reveals a clear intent to invest the named recipient of CART funds with considerable discretion in their allocation. For example, subsection 1.(1) provides, "The funds credited to each county shall be used by the county solely for the construction . . ." (emphasis added). In addition, that subsection provides specifically that, "[i]n counties having the township form of county organization, the funds credited to such counties shall be expended solely under the control and supervision of the county court, and shall not be expended by the various townships located within such counties." (emphasis added). We also note that the General Assembly has provided that the County Aid Road Trust funds shall be used "as the county court shall direct." Section 231.441.1, RSMo.

We have examined Chapter 233, RSMo, entitled "Incorporated Road Districts" and find therein no legislative indication, express or implied, that special road districts organized thereunder

Honorable Walt Mueller

are entitled to CART funds. Sections 233.170 to 233.315, RSMo, authorize the establishment of special road districts in counties not under township organization. These districts are authorized to receive a certain amount of the funds collected as the "special road and bridge tax" authorized by Section 137.555, RSMo, pursuant to Section 233.195, RSMo, and are authorized under Section 233.200, RSMo, to issue road and bridge bonds. We find no language, however, entitling special road districts to CART funds which are distributed to the county courts.

Sections 233.320 to 233.445, RSMo, authorize the establishment of special road districts in township organization counties. These districts are authorized to issue road and bridge bonds, Section 233.345, RSMo, but again we find no language that could be construed as entitling these districts to CART funds which are distributed to the counties.

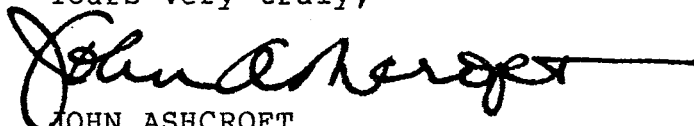
Under the rule of statutory construction that "the express mention of one thing implies the exclusion of another," Harrison v. MFA Mutual Insurance Co., 607 S.W.2d 137, 146 (Mo. banc 1980), it is fair to conclude, as we do, that the General Assembly's specific delineation of the districts' taxing authority evinces a legislative intent that the rights of special road districts do not extend to CART funds. We enclose for your information three opinions of this office in which we discuss county expenditures of CART funds for roads located in special road districts.

#### CONCLUSION

It is the opinion of this office that a county court, pursuant to a plan adopted in accordance with Section 231.441, RSMo, may require special road districts to provide matching funds in actual dollars or otherwise, in order to receive CART funds from the county in which the special road district is located.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Charles R. Miller.

Yours very truly,



JOHN ASHCROFT  
Attorney General

enclosures: Op. No. 39  
2-6-64, Balkenbush

Op. Ltr. No. 99  
3-17-81, Morrison

Op. No. 320  
8-21-70, Proffer

*Attorney General of Missouri*

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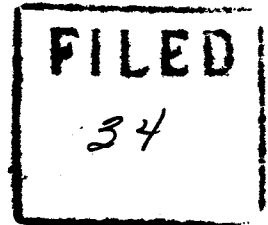
JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT  
ATTORNEY GENERAL

(314) 751-3321

February 18, 1982

OPINION LETTER NO. 34



The Honorable Vernon E. Bruckerhoff  
Representative, District 127  
Room 201A, State Capitol Building  
Jefferson City, Missouri 65101

Dear Representative Bruckerhoff:

This letter is in response to your request for an opinion as follows:

Is a county nursing home that is not part of a nursing home district, eligible under state of Missouri statutes, to receive any support of financial assistance from county general revenue funds?

You further inform us:

The Board of Trustees, elected by the people of Ste. Genevieve County is seeking additional sources of funding in order to keep resident rates as low as possible. The Board has sought opinions on whether this county nursing facility is legally eligible for support and assistance from county general revenue and federal revenue sharing.

Federal regulations state that any entity eligible for any kind of funding from county revenue would be eligible for revenue sharing. An affirmative decision in this matter would open up two sources of additional funding which the facility does not now have.

The Honorable Vernon E. Bruckerhoff

Our written questions to the Prosecuting Attorney of Ste. Genevieve County to determine the provisions of state law under which the Riverview Manor Nursing Home is organized have not been answered. Our inquiry is based on an apparent discrepancy between your question and the statement of facts you supplied. Under Missouri law, a county nursing home does not have a Board of Trustees; a county nursing home is under the direct control of the governing body of the county. See Sections 49.270 and 205.375, RSMo 1978. Sections 198.200 to 198.360, RSMo 1978, provide for the establishment of Nursing Home Districts, which pursuant to Section 198.290, RSMo 1978, are managed by boards of directors.

We have inquired of Martin Radmer, Administrator of the Riverview Manor Nursing Home, concerning the organization of the Riverview Manor Nursing Home. Mr. Radmer informed us that the nursing home is a county nursing home which is not operated in conjunction with a county hospital. Further, he informed us that the nursing home is not leased to any third person or entity for management purposes as permitted by Section 205.375.4, RSMo 1978. Therefore, notwithstanding the unusual governing structure of the Riverview Manor Nursing Home, we must limit this opinion's application to county nursing homes; it has no intended relevance either to nursing home districts or to nursing homes operated as part of county hospitals.

Section 49.270, RSMo 1978, provides:

The said [county] court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase; lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county.

This section gives the county court the power to control and manage all property belonging to the county. While the county is the "owner" of county property, the effective exercise of that ownership is vested in the county court. Thus, a county nursing home is property that is under the control and management of the county court.

The Honorable Vernon E. Bruckerhoff

Section 50.550, RSMo 1978, within Chapter 50, entitled "County Finances and Budget," provides in pertinent part:

The annual budget shall present a complete financial plan for the ensuing budget year. It shall set forth all proposed expenditures for the administration, operation and maintenance of all offices, departments, commissions, courts and institutions; . . . All receipts of the county for operation and maintenance shall be credited to the general fund, and all expenditures for these purposes shall be charged to this fund; . . .

In our Opinion No. 82, Faulkner, 1963, we held that a county court could expend funds to care for resident patients of a county operated nursing home. This opinion stands for the proposition that a county may subsidize care for indigent residents of a nursing home. For your convenience, we have enclosed a copy of that opinion.

In our Opinion No. 14, Cable, 1959, we held that a county court may provide for its indigent by paying a private nursing home institution for their care if this is the most economically expedient manner to provide such care. A copy of Opinion No. 14 is attached for your convenience.

Section 205.375.2 authorizes a county court to "acquire land to be used as sites for, construct and equip nursing homes and . . . contract for materials, supplies, and services necessary to carry out such purposes."

Section 205.375.4 provides that the county court may lease a nursing home and the equipment therein "to any person, firm, corporation or to any nonprofit organizations for the purpose of operation in the manner provided in [205.375.1]."

In Lancaster v. County of Atchison, 180 S.W.2d 706 (Mo. banc 1944), the Supreme Court stated:

[C]ounties, like other public corporations, "can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of

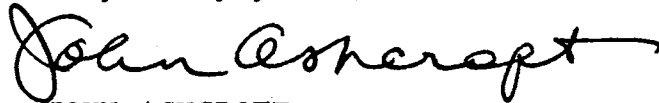
The Honorable Vernon E. Bruckerhoff

power is resolved by the courts against the corporation and the power is denied." [citations omitted] We have repeatedly approved this quotation. . . . Id. at 708.

Although we find no express provision in the statutes which would allow a county court to provide funds from its general revenue for the operation of a county nursing home, we believe that such authority can be reasonably implied. In our Opinion No. 82, supra, we held that Section 205.375 implied an authority in a county court to preserve, maintain and repair a county nursing home. We believe that Section 205.375 read in harmony with Sections 49.270 and 50.550 necessarily implies that a county court has authority to operate a county nursing home with county funds.

Therefore, it is our opinion that a county court has authority to expend general revenue for the operation of a county nursing home.

Very truly yours,

A handwritten signature in black ink, reading "John Ashcroft". The signature is fluid and cursive, with a long horizontal stroke at the end.

JOHN ASHCROFT  
Attorney General

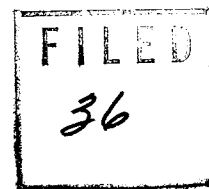
Enclosure: Opinion No. 82 (1963)  
Opinion No. 14 (1959)

SOLID WASTE: One or more cities and/or counties  
CITY-COUNTY AGREEMENTS: may enter into a contract for solid  
CITIES, TOWNS AND VILLAGES: waste collection and for operation  
COUNTIES: of a solid waste disposal facility.  
Cities and/or counties may not form  
a corporation to contract for and operate a solid waste disposal  
facility and may not jointly issue bonds to construct a solid  
waste processing facility.

January 21, 1982

OPINION NO. 36

The Honorable Travis Morrison  
Representative, District 152  
Room 235, Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Morrison:

This opinion is in response to your request which asks the following questions:

1. Can one or more cities and/or counties enter in long-term contracts, jointly or severally, for solid waste collection and for operation of a solid waste disposal area or processing facility?
2. Can cities and/or counties form a corporation to contract for and operate such a facility.
3. Can cities and/or counties jointly issue bonds to construct a solid waste processing facility?

We construe the phrase "cities and/or counties" in each of your questions to mean and include two or more cities, two or more counties, and any combination of cities and counties, and herein we use such phrase in that sense. We further assume, for purposes of responding to your questions, that all the parties to any such contract, and the incorporators of any such corporation, are cities and/or counties and that no private persons or entities are involved.

The Honorable Travis Morrison

As to your first question--whether cities and/or counties may enter into long-term contracts for solid waste collection and disposal--Section 260.215.1, RSMo 1978, with certain restrictions contained in Section 260.215.4, RSMo 1978, provides:

[E]ach city and each county or a combination of cities and counties shall provide individually or collectively for the collection and disposal of solid wastes within its boundaries; . . .

Section 260.215.3(1) provides:

Cities or counties may contract as provided in chapter 70, RSMo, with any person, city, county, common sewer district, political subdivision, state agency or authority in this or other states to carry out their responsibilities for the storage, collection, transportation, processing, or disposal of solid wastes.

Further, Article VI, Section 16, Missouri Constitution (1945), states:

Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, or with other states or their municipalities or political subdivisions, or with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law.

Also, see Section 70.220, RSMo 1978, and our Opinion No. 42 (1974), a copy of which is enclosed.

It is our view that one or more cities and/or counties may, pursuant to the above authority, enter into contracts, jointly or severally, for solid waste collection and disposal facilities. Without a specific contract to consider, we will not speculate on the propriety of a particular length of term.

Your second question asks whether cities and/or counties may form a corporation to contract for and operate such a facility.

The Honorable Travis Morrison

Article VI, Section 23, Missouri Constitution (1945), states:

No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this constitution.

Moreover, under the general and business corporation law of Missouri, Chapter 351, RSMo, and particularly Section 351.050, RSMo 1978, it is provided that "[o]ne or more natural persons of the age of eighteen years, or more, may act as an incorporator of such corporation . . ." [Emphasis added]. A similar requirement that incorporators shall be "natural persons" is contained in Section 355.040, RSMo Supp. 1981, pertaining to corporations incorporated under the general not for profit corporation law, Chapter 355, RSMo. Cities and counties are not natural persons. Because cities and counties are precluded from owning or subscribing for stock in a corporation or acting as incorporators of a corporation, we believe cities and counties are prohibited from forming a corporation to contract for and operate such a facility.

Your third question is whether cities and/or counties may jointly issue bonds to construct a solid waste processing facility. We note at the outset that neither a county nor any other political subdivision of the state may contract any form of indebtedness, absolute or contingent, except such as is permitted by law. See Fulton National Bank v. Callaway Memorial Hospital, 465 S.W.2d 549 (Mo. 1971); First National Bank of Stoutland v. Stoutland School District R2, 319 S.W.2d 570 (Mo. 1958).

Section 70.250, RSMo 1978, appears to have application to the financing of solid waste processing projects. It provides:

Any such municipality or political subdivision may provide for the financing of its share or portion of the cost or expenses of such contract or cooperative action in a manner and by the same procedure for the financing by such municipality or political subdivision of the subject and purposes of said contract or cooperative action [as] if acting alone and on its own behalf.

The Honorable Travis Morrison

The issue here is not the authority of each participant in a joint project to issue bonds, but the authority of all the parties to such project to join together to issue one offering. In our opinion, no such authority exists. We have been unable to find any authority for the joint issuance of bonds to construct a solid waste processing facility for cooperative use. Indeed, the express language of Section 70.250, RSMo 1978, permits each participant to provide only for "the financing of its share or portion. . . ." [Emphasis added].

Therefore, we conclude that cities and/or counties may not jointly issue bonds to construct a solid waste processing facility, and that each participant is responsible only for financing its share of the costs through whatever means are legally available to it.

#### CONCLUSION

It is the opinion of this office that one or more cities and/or counties may enter into a contract for solid waste collection and for operation of a solid waste disposal facility. However, cities and/or counties may not form a corporation to contract for and operate a solid waste disposal facility and may not jointly issue bonds to construct a solid waste processing facility.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Edward F. Downey.

Very truly yours,



JOHN ASHCROFT  
Attorney General

Enclosure: Opinion No. 42 (1974)

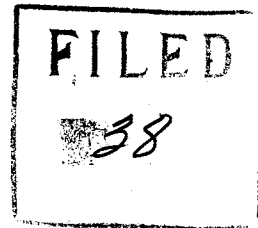
PEACE OFFICERS:  
POLICE TRAINING:  
CRIMINAL COSTS:  
CRIMINAL FEES:  
COUNTY FUNDS:

County funds generated by the collection of fees for violations of the general criminal laws of the state, pursuant to Section 590.140.1, RSMo 1978, may not be used to train municipal police officers.

January 14, 1982

OPINION NO. 38

Mr. Edward D. Daniel, Director  
Department of Public Safety  
621 East Capitol Avenue  
Jefferson City, Missouri 65101



Dear Mr. Daniel:

This is in response to your question,

When a city police officer writes a ticket within his jurisdiction he has the option to charge the person with a state criminal charge or a city municipal [sic] charge. If he writes a state criminal charge, the person appears in the Associated [sic] Circuit Court. If he writes a municipal charge, the person appears in a municipal court. If the training funds generated as described in 590.140 RSMo. are a result of criminal charges levied by a city police officer can those funds be used to train city police officers or are the funds solely to be used for county officers?

You have informed us that some county officials are interested in using excess amounts in these county funds to train city police officers, and have asked if such an expenditure is authorized by Chapter 590, RSMo. After a careful examination of Chapter 590, we conclude that county training funds generated as described in Section 590.140, RSMo 1978, may not be used to train city police officers.

Mr. Edward D. Daniel

The primary rule in determining the intent of the General Assembly is to give the words used in the statute their plain and ordinary meaning. City of Willow Springs v. Missouri State Librarian, 596 S.W.2d 441, 445 (Mo. banc 1980). Where the language in the statute is plain and unambiguous, any construction or interpretation is unnecessary and unwarranted. Schimmer v. H. W. Freeman Construction Co., Inc., 607 S.W.2d 767, 769 (Mo.App. 1980).

Section 590.140 provides:

1. A fee of up to two dollars may be assessed as costs in each court proceeding filed in any court in the state for violations of the general criminal laws of the state, including infractions, or violations of county or municipal ordinances, provided that no such fee shall be collected for non-moving traffic violations, and no such fee shall be collected for violations of fish and game regulations, and no such fee shall be collected in any proceeding in any court when the proceeding or defendant has been dismissed by the court. For violations of the general criminal laws of the state or county ordinances, no such fee shall be collected unless it is authorized by the county government where the violation occurred. For violations of municipal ordinances, no such fee shall be collected unless it is authorized by the municipal government where the violation occurred. Such fees shall be collected by the official of each respective court responsible for collecting court costs and fines and shall be transmitted monthly to the treasurer of the county where the violation occurred in the case of violations of the general criminal laws of the state or county ordinances and to the treasurer of the municipality where the violation occurred in the case of violations of municipal ordinances.

2. Each county and municipality may use funds received under this section only to pay for the training required as provided in section 590.100 to 590.150, provided that any excess funds not needed to pay for such training may be used to pay for additional

Mr. Edward D. Daniel

training for peace officers or for training for other law enforcement officers employed or appointed by the county or municipality.  
[Emphasis added.]

Section 590.110.1, RSMo 1978, provides, in pertinent part, that:

Any person who is employed or appointed as a peace officer after December 31, 1978, shall be employed or appointed on a temporary and probationary basis, and the hiring agency shall, within one year after the employee has assumed his office, take all necessary steps to qualify the employee for certification by the director. [Emphasis added.]

Thus, the responsibility for providing probationary peace officers with training falls on the agency which hired the officer.

The director of the Department of Public Safety may certify a peace officer only after the training standards established under Sections 590.100 to 590.150 are met by a probationary officer. We note further that the standards established under Sections 590.100 to 590.150 are minimum standards; Section 590.105, RSMo 1978, authorizes peace officers, departments and agencies to adopt higher standards than the minimum mandatory training standards implemented pursuant to Sections 590.100 to 590.150.

Section 590.140.2 provides that with the exception of the use of excess funds, the only use which may be made of funds generated under Section 590.140.1 is training required under Sections 590.100 to 590.150. Since only the hiring agency has responsibility for training employees, we assume your question relates to the use of excess funds by the hiring agency.

Section 590.140.2 provides two ways in which excess funds generated pursuant to Section 590.140.1 may be employed: (1) to pay for additional training for peace officers, and (2) to pay for training "other law enforcement officers employed or appointed by the county or municipality."

In our Opinion Letter No. 32, Daniel, 1981, we stated that:

[E]ach county and municipality may use any excess funds not needed to pay for the minimum mandatory training for such additional training as it sees fit. This is in keeping

Mr. Edward D. Daniel

with subsection 2 of § 590.105, RSMo 1978, which authorizes peace officers within this state to adopt standards which are higher than the minimum standards set forth by the director of the Department of Public Safety. . . . [T]he Director has no responsibility with respect to the excess funds or the type of training received therewith. [Emphasis added.]

We believe that the "additional training" for which the first option under Section 590.140.2 allows the expenditure of excess funds by a county or a municipality is limited to (1) additional training for peace officers over and above that required under Sections 590.100 and 590.150, and (2) peace officers for whom the county or municipality has a training responsibility under Section 590.110.1. Opinion Letter No. 32, supra, holds that the director of the Department of Public Safety has no responsibility for the use of the excess funds. The agency employing the excess funds has discretion only with regard to the type of additional training it will provide its peace officers; that agency may not, however, pay for any training for peace officers for whom it has no training responsibility.

The second permitted use of excess funds under Section 590.140.2 is clearly limited to law enforcement personnel employed or appointed by the city or county. Because city police officers are neither "employed" nor "appointed" by a county, it is clear that the legislature did not intend that county funds be used to train city police officers.

Our holding is consistent with the general scheme of Sections 590.100 to 590.150, which mandates separation between the entities of government for police training purposes by requiring inter alia, that the hiring agency be responsible for qualifying its probationary peace officer employees (Section 590.110.1) and that fees generated under Section 590.140.1 be segregated according to the violation charged, i.e., fees collected for violations of the general criminal laws of the state must be transmitted to the county treasurer, and fees collected for violations of municipal ordinances must be transmitted to the municipal treasurer, irrespective of which entity employs the peace officer who makes an arrest (Section 590.140.1).

We add a caveat. Our opinion herein is limited to holding that county funds may not be used to pay for training for municipal police officers. We do not intend to discourage joint cooperation between the various law enforcement agencies in this state for training purposes.

Mr. Edward D. Daniel

CONCLUSION

It is, therefore, the opinion of this office that county funds generated by the collection of fees for violations of the general criminal laws of the state, pursuant to Section 590.140.1, RSMo 1978, may not be used to train municipal police officers.

This opinion, which I hereby approve, was prepared by my assistant, Charles R. Miller.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft". The signature is written in dark ink and is positioned above the printed name and title.

JOHN ASHCROFT  
Attorney General

COUNTY CLERKS:

FOURTH CLASS CITIES:

ASSESSMENT BOOKS:

FEES:

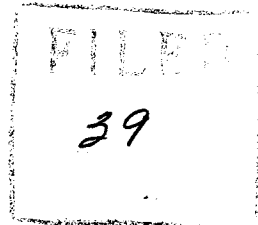
The county clerk of a third class county must deliver to the mayor of any fourth class city within the county which does not elect an assessor a certified abstract from

his assessment books of all property within the city subject to taxation by the state and the assessed value thereof and must perform this service without charge.

January 7, 1982

OPINION NO. 39

The Honorable Herbert A. Kasten, Jr.  
Prosecuting Attorney  
Ste. Genevieve County  
201 Merchant  
Ste. Genevieve, Missouri 63670



Dear Mr. Kasten:

This is in response to your request for an opinion on the following questions:

- (1) What are the duties of the county clerk of a third class county with respect to assessment of the property of a fourth class city within the county which does not elect an assessor?
- (2) If the county clerk is required to provide a certified abstract from the county's assessment books to such cities, can that clerk charge on behalf of the county for providing that abstract, and if so, how much can that clerk charge?

Your first question is rather general in nature and will be answered in conjunction with the second question.

Section 94.190.3, RSMo 1978, which deals only with fourth class cities, states:

In cities which do not elect an assessor, the county clerk shall deliver to the mayor, on or before the first day of October of each year, a certified abstract from his assessment books of all property within the city subject to taxation by the state and the assessed value

The Honorable Herbert A. Kasten, Jr.

thereof as agreed upon by the board of equalization. The mayor shall immediately transmit the abstract to the council which shall establish by ordinance the rate of taxes for the year.

This section places upon the county clerk the duty to deliver a certified abstract from his assessment books to the mayor of any fourth class city within the county which does not elect an assessor.

There is no statute which specifically authorizes the county clerk to charge a fee on behalf of the county for providing the certified abstract. The county clerk is permitted under Section 51.410, RSMo Supp. 1981, to charge a \$3.00 fee for a variety of services rendered. That section states:

The county clerk shall charge a fee of three dollars for each certificate, bond, filing, petition, license, order, recording, or other document, writing, or transaction handled in accordance with the duties of the office of county clerk. The clerk shall pay into the treasury of the county any and all fees collected under the provisions of this section.

However, it is the position of this office as expressed in our Opinion No. 37 (1980), a copy of which is enclosed, that a county clerk may not charge either the fee provided for in Section 51.410 or any other fee for providing the certified abstract to a municipality in the absence of express statutory authorization for such charge.

#### CONCLUSION

It is the opinion of this office that the county clerk of a third class county must deliver to the mayor of any fourth class city within the county which does not elect an assessor a certified abstract from his assessment books of all property within the city subject to taxation by the state and the assessed value thereof, and that the county clerk must perform this service without charge.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Henry Herschel.

Very truly yours,



JOHN ASHCROFT  
Attorney General

Enc: Opinion No. 37 (1980)

COUNTY SHELTERED WORKSHOPS:  
COUNTY LAND:  
INDEBTEDNESS:

The board of directors of a sheltered workshop or residence facility may hold title to property. Such a board does not have authority to borrow money to purchase property and construct facilities.

April 26, 1982

OPINION NO. 40

The Honorable Kenneth D. Hassler  
Prosecuting Attorney  
Platte County Courthouse  
Platte City, Missouri 64079

FILED

40

Dear Mr. Hassler:

This is in response to your request for an opinion on the following questions:

1. Under Section 205.968 to 205.972 of the Revised Statutes of Missouri, does the Platte County Sheltered Facilities Board have the authority and power to own property in the name of the Platte County Sheltered Facilities Board? By way of explanation it has been suggested that the Platte County Sheltered Facilities Board lacks authority to take legal title to property and that any property utilized for the purposes of the Platte County Sheltered Facilities Board and purchased by the Platte County Sheltered Facilities Board should be owned by Platte County.

2. Under Section 205.968 to 205.972 of the Revised Statutes of Missouri and Article 6, Section 26, of the Missouri Constitution, does the Platte County Sheltered Facilities Board have the authority to borrow money to purchase property and construct facilities to provide services for handicapped persons as defined in Section 178.900 RSMo (1969) [sic]? The Platte County Sheltered Facilities Board has a waiting list of "handicapped persons" desiring to be placed in a facility, but does not have sufficient funds to build a facility without borrowing money.

The Honorable Kenneth D. Hassler

The county court or other governing body of a county or a city not within a county is authorized to establish a sheltered workshop and/or residence facility for the care and/or employment of handicapped persons. Section 205.968.1, RSMo 1978. Where such a facility is established, the governing body of the county or city shall appoint a nine-member board of directors. Section 205.970.1, RSMo Supp. 1981.

Section 205.970 further provides that:

2. The administrative control and management of the facility shall rest solely with the board of directors, and the board shall employ all necessary personnel, fix their compensation, and provide suitable quarters and equipment for the operation of the facility from funds made available for this purpose.

\* \* \*

5. The board shall set rules for admission to the facility, and shall do all other things necessary to carry out the purposes of sections 205.968 to 205.972.

6. The board may contract with any not for profit corporation including any corporation which is incorporated for the purpose of implementing the provisions of sections 178.900 to 178.970, RSMo, for any common services, or for the common use of any property of either group.

7. The board may accept any gift of property or money for the use and benefit of the facility, and the board is authorized to sell or exchange any such property which it believes would be to the benefit of the facility so long as the proceeds are used exclusively for facility purposes. [Emphasis added].

Our task in rendering this opinion is to seek the intent of the legislature. This is the primary rule of statutory construction. City of Willow Springs v. Missouri State Librarian, 596 S.W.2d 441, 445 (Mo. banc 1980). In addition, we are to assign the words and phrases employed by the legislature their usual, plain and ordinary meaning. State ex rel. Ashcroft v. Union Electric Co., 559 S.W.2d 216, 221 (Mo.App. 1977).

The Honorable Kenneth D. Hassler

We find no express statutory provision granting authority to such a board to acquire legal title to property. Thus, the question essential for resolution of your request is whether such a power is necessarily or fairly implied in Section 205.970.

We answer affirmatively. Subsection 2 requires the board of directors to "provide suitable quarters and equipment for the operation of the facility from funds made available for this purpose." The word "quarters" is defined as "lodgings, place of abode." Webster's New World Dictionary (2nd Ed. 1980). Thus, we believe that the duty to provide quarters and equipment (property) necessarily infers an authorization to own property. We note that the board of directors is to provide quarters "from funds," the inference being that the board is to provide such quarters through an expenditure of funds and not merely to accept property provided by the county court. Said another way, the governing body of the county or city is to make funds (not property) available to the board.

In addition, subsection 7 empowers the board of directors to "accept any gift of property or money for the use and benefit of the facility." Section 205.970 makes no distinction between real and personal property. The board may "sell or exchange any such property . . . so long as the proceeds are used exclusively for facility purposes."

We believe that the express powers granted to a sheltered facility board of directors in Section 205.970 necessarily imply an authority to own property in its own name. Without such authority, the ability of the board to carry out its statutory mandate is diminished.

In answer to your second question, we find neither express nor implied constitutional or statutory authority which would allow sheltered facility boards to borrow money in anticipation of the collection of revenues. Although such boards may ". . . expend tax funds or other funds" under Section 205.970.3, that subsection confers no authority to borrow money. In contrast, Section 50.060, RSMo 1978, provides express authorization for county courts of second class counties, such as Platte County, to borrow money in anticipation of the collection of taxes and revenues for the current fiscal year. If such a county court wishes to borrow money in excess of its income and revenues for that year, it must seek voter approval under Article VI, Section 26(b) of the Missouri Constitution. In no event would the sheltered facility board have such authority, even with voter approval.

The Honorable Kenneth D. Hassler

Our Opinion No. 41, Lampo, 1980, addresses questions similar to those you raise. To the extent that Opinion No. 41 holds that a mental health board of trustees may not hold title to real property, such opinion is hereby modified consistent with our holding herein that a board of directors of a sheltered facility (and a mental health board of directors) may hold title to property.

CONCLUSION

It is our opinion that the board of directors of a sheltered workshop or residence facility may hold title to property. It is further our opinion that such a board of directors does not have authority to borrow money to purchase property and construct facilities.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ashcroft", with a stylized flourish at the end.

JOHN ASHCROFT  
Attorney General

*Attorney General of Missouri*

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

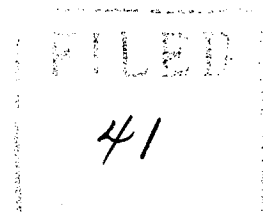
JOHN ASHCROFT  
ATTORNEY GENERAL

(314) 751-3321

January 7, 1982

OPINION LETTER NO. 41

The Honorable Travis Morrison  
Representative, District 152  
Route 1, Box 216B  
West Plains, Missouri 65775



Dear Representative Morrison:

This letter is in response to your request for an opinion of this office on whether the Missouri Division of Employment Security has the authority to amend its regulation 8 CSR 10-4.100 to conform to recent changes in Section 3304(a)(15) of the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311.

In your opinion request you explained that "[t]he Division believes that it lacks the authority to revise its regulation since it claims to already be in conformity." In reference to our requirement of a written legal opinion on the question you submitted, prepared by counsel for the agency, you stated: "I have asked by copy of this opinion request to the Division for their attorneys to supply the information requested."

As of this writing we have not received from the Division of Employment Security any affirmation of your first-quoted statement, and we have not received any information as to the Division's legal position regarding the matters set forth in your opinion request.


However, we observe that Section 288.390, RSMo 1978, provides that:

If the Federal Unemployment Tax Act, the Federal Social Security Act or other related federal laws are amended to provide minimum standards for the payment of unemployment benefits, such standards shall become a part of this law to the extent necessary to entitle employers subject to this law to claim the maximum allowable credit against the federal unemployment tax. The provisions of this section shall be implemented by regulation by the division.

The Honorable Travis Morrison

We believe that Section 288.390 provides ample authority for the Division of Employment Security to amend its regulations to conform to the provisions of the Federal Unemployment Tax Act establishing minimum standards for the payment of unemployment benefits, to the extent necessary to entitle employers subject to the Missouri Employment Security Law, Chapter 288, RSMo, to claim the maximum allowable credit against the federal unemployment tax.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft".

JOHN ASHCROFT  
Attorney General

*Attorney General of Missouri*

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

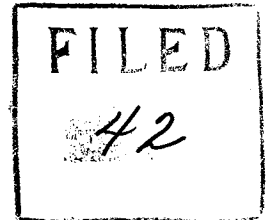
JOHN ASHCROFT  
ATTORNEY GENERAL

(314) 751-3321

January 14, 1982

OPINION LETTER NO. 42

Edward D. Daniel  
Director  
Department of Public Safety  
621 East Capitol Avenue  
Jefferson City, Missouri 65101



Dear Mr. Daniel:

This letter is in response to your inquiry asking whether the provisions of Section 320.210, RSMo, which purport to limit the employees of the state fire marshal to "a total of nine employees," presently apply. Section 320.210 was enacted in 1972 and has not been amended.

We note that Section 11, Appendix B, RSMo, Omnibus State Reorganization Act of 1974, which established the Department of Public Safety, provides:

6. All the powers, duties and functions of the safety and fire prevention bureau of the department of public health and welfare are transferred by type I transfer to the director of public safety.

7. All the powers, duties and functions of the state fire marshal, chapter 320, RSMo, and others, are transferred to the department of public safety by type I transfer. The fire marshal shall be appointed by the department director.

You advise us that the director of the Department of Public Safety thereafter exercised the powers given him under Section 1 of the Reorganization Act (now set forth in RSMo Supp. 1981) by transferring the personnel and functions of the safety and fire

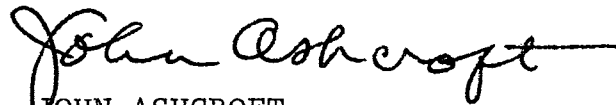
Edward D. Daniel

prevention bureau as well as other personnel and functions into the office of the state fire marshal. We are also advised that the General Assembly has appropriated for a number of full-time equivalencies well in excess of the limit of nine employees provided in Section 320.210.

It is our view that, in these circumstances, giving appropriate consideration to the authority of the director of the department under Section 1.7(1)(2) of the Reorganization Act to assimilate and assign such type I transfers as he shall determine to provide maximum efficiency, economy of operation and optimum service, the legislature intended that the limitation of Section 320.210 respecting "a total of nine employees" should no longer apply to the reorganized office of the state fire marshal.

Our conclusion is limited to the situation here presented. Whether other similar statutory limitations on the total number of employees which may exist with respect to other agencies were affected by the Reorganization Act or action taken pursuant thereto will depend entirely upon the particular circumstances involved.

Very truly yours,

A handwritten signature in dark ink, reading "John Ashcroft". The signature is fluid and cursive, with a long horizontal stroke at the end.

JOHN ASHCROFT  
Attorney General

*Attorney General of Missouri*

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

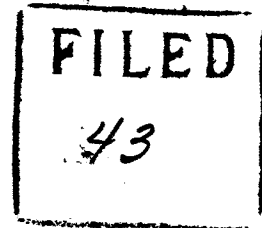
JOHN ASHCROFT  
ATTORNEY GENERAL

(314) 751-3321

May 13, 1982

OPINION LETTER NO. 43

The Honorable Hardin Cox  
Senator, District 12  
602 West Calhoun  
Rock Port, Missouri 64482



Dear Senator Cox:

This letter is in response to your request for an opinion on the following question:

May the department of natural resources lease equipment purchased by the state of Missouri to political subdivisions or not for profit corporations?

We know of no statute authorizing the Department of Natural Resources to lease equipment to political subdivisions or to not for profit corporations. It is our view that in the absence of a statute authorizing such a lease, the department has no such authority.

We point out that Sections 70.210, et seq., RSMo, authorize certain contracts and cooperative agreements between a political subdivision, as defined therein, and a duly authorized agency of the state. Whether the Department of Natural Resources may join in such a cooperative venture would depend upon facts which are not presently before us.

Very truly yours,

JOHN ASHCROFT  
Attorney General

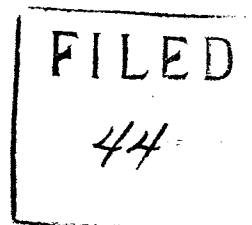
DRUGS: (1) A licensed pharmacist may  
MEDICINE: permit an unlicensed person to  
PRESCRIPTIONS: perform all steps incident to  
PHARMACISTS: compounding, dispensing, label-  
PHYSICIANS AND SURGEONS: ing, and selling prescription  
drugs at retail, provided that

the unlicensed person acts at all times in the presence of the licensed pharmacist and under his direct supervision. (2) A licensed pharmacist need not personally perform the selection from bulk inventory of the type, strength, and dosage of the drug prescribed, but must personally inspect and verify the accuracy and completeness of the label affixed to the prescription drug container and must verify the correctness of the contents of the drug container, before it is delivered or sold to the patient at retail. (3) A physician may only allow an unlicensed person to prepare and affix, under his supervision, the label required by law to a medication he dispenses, and must personally perform all other aspects of the compounding and dispensing of his own prescription medications. (4) The dispensing physician must personally perform the selection from inventory of the type, strength, and dosage of the drug he prescribed; he must personally verify the accuracy and completeness of the contents of the label affixed to the patient's prescription container; and he must personally verify that the drug in the prescription container is in fact the drug indicated upon the prescription label.

May 24, 1982

OPINION NO. 44

The Honorable Robert Jackson  
Representative, District 134  
Box 417  
Greenfield, MO 65661



Dear Representative Jackson:

This replies to your request for our opinion on the following questions of law:

1. May anyone other than a licensed pharmacist or physician reduce bulk drugs prescribed by a physician into smaller packages, complete the label to be affixed to the package of drugs and hand such drugs to the patient?

The Honorable Robert Jackson

2. To what extent may a pharmacist or physician delegate the functions of dispensing drugs to persons or employees who are not pharmacists or physicians?
3. Must a licensed pharmacist or physician either personally perform or personally verify the accurateness of the following tasks in each instance of the dispensing of a drug to a patient:
  - a. The selection from bulk inventory of the type of drug, the strength of the drug and the dosage of the drug prescribed by the physician?
  - b. The verification of the accuracy and completeness of the contents of the label affixed to the container to be given to the patient?
  - c. The verification that the drug in the patient's drug container is in fact the drug that the label says it is?

Section 338.010, RSMo 1978, prohibits an unlicensed person from compounding, dispensing, or selling at retail a drug or medicine prescribed by a physician, except under certain limited circumstances. That section states, in pertinent part:

It shall be unlawful for any person not licensed as a pharmacist within the meaning of sections 338.010 to 338.190 to compound, dispense or sell at retail any drug, chemical, poison or pharmaceutical preparation upon the prescription of a physician, or otherwise, or to compound physicians' prescriptions except as an aid to or under the direct supervision of a person licensed as a pharmacist under sections 338.010 to 338.190. And it shall be unlawful for any owner or manager of a pharmacy or drug store, or other place of business, to cause or permit any other than a person licensed as a pharmacist to compound, dispense or sell at retail, any drug, medicine or poison, except as an aid to or under the direct supervision of a person licensed as a

The Honorable Robert Jackson

pharmacist; provided, however, that nothing in this section shall be construed to interfere with any legally registered practitioner of medicine or dentistry in the compounding or dispensing of his own prescriptions . . . .

Likewise, Section 338.240(4), RSMo 1978, requires that each Missouri pharmacy be managed ". . . under the supervision of either a registered pharmacist, or an owner or employee of the owner, who has at his place of business a registered pharmacist employed for the purpose of compounding physician's prescriptions in the event any such prescriptions are compounded or sold[.]" Furthermore, 4 CSR 220-2.010(1)(A), a rule of the Board of Pharmacy, provides in pertinent part:

At all times when physicians' prescriptions are compounded in a drug store, pharmacy, apothecary shop, chemist shop, or other place of business where prescriptions are filled, there shall be on duty and present in such place of business a pharmacist registered in the state of Missouri as provided by law. When there is no pharmacist on duty, no prescription will be compounded . . . .

Sections 338.010 and 338.240 and 4 CSR 220-2.010(1)(A) were recently construed in Jack Dunning and Medirate Professional Pharmacy, Inc. v. Board of Pharmacy, State of Missouri, Nos. 43504 and 43505 (Mo.App., E.D. January 12, 1982), application for transfer to Missouri Supreme Court denied No. 63842 (April 13, 1982). Citing Duensing v. Huscher, 431 S.W.2d 169, 173-74 (Mo. 1968), the Missouri Court of Appeals held that these provisions of law are violated when persons who are not licensed pharmacists fill prescriptions or dispense medications in a pharmacy at a time when no licensed pharmacist is present on the pharmacy premises to supervise this conduct. This holding is consistent with our Opinion No. 81 (1962), a copy of which is enclosed.

With regard to a physician who dispenses his own prescription medications, there is no provision in Section 338.010 which allows an unlicensed person to compound, dispense, or sell at retail a prescription drug under the direct supervision of the prescribing physician. Section 338.010 only specifically authorizes a "legally registered practitioner of medicine or dentistry" to compound or dispense his own prescriptions. Further, we find no provision in Chapter 334, RSMo, which regulates the practice of medicine, that governs the dispensing of prescription medications by a prescribing physician. However, Section 338.059, RSMo 1978, provides in part:

The Honorable Robert Jackson

1. It shall be the duty of a licensed pharmacist or a physician to affix or have affixed by someone under his supervision a label to each and every container in which is placed any prescription drug upon which is typed or written the following information:

(1) The date of [sic] the prescription is filled;

(2) The sequential number;

(3) The patient's name;

(4) The prescriber's directions for usage;

(5) The prescribing doctor's name;

(6) The name and address of the pharmacy;

(7) The exact name and dosage of the drug dispensed;

(8) There may be one line under the words written stating "Refill" with a blank line or squares following; immediately under the word "Refill" the words "No Refill";

(9) When a generic substitution is dispensed, the name of the manufacturer or an abbreviation thereof shall appear on the label or in the pharmacist's records as required in section 338.100.

It is a rule of statutory construction that:

Statutes must be read in pari materia and, if possible, given effect to each clause and provision. Where one statute deals with a subject in general terms and another deals with the same subject in a more minute way, the two should be harmonized if possible, but to the extent of any repugnancy between them the definite prevails over the general. (State ex rel. Fort Zumwalt School District v. Dickherber, 576 S.W.2d 532, 536-537 (Mo. banc

The Honorable Robert Jackson

1979). See also Goldberg v. Administrative Hearing Commission, 609 S.W.2d 140, 144 (Mo. banc 1980).)

Section 338.059 specifically allows an unlicensed person acting under the supervision of a physician to affix a label to a prescription drug container bearing the requisite information, while Section 338.010 generally prohibits anyone other than a pharmacist, a pharmacist's aid or assistant, or a physician or dentist from compounding, dispensing, or selling at retail prescription medications. Harmonizing these statutes, we believe that a physician may only delegate to another, acting under his supervision, the preparation and affixing of a proper label to his prescription medications to be dispensed to his own patients. All other steps in the dispensing process must be personally performed by the dispensing physician himself.

Thus, in answer to your first two questions, a licensed pharmacist or physician may delegate duties relating to the dispensing of prescription drugs only to the following extent: A licensed pharmacist may allow an unlicensed person to perform all steps incident to compounding, dispensing, labeling, and selling prescription drugs at retail, provided that the unlicensed person acts at all times in the presence of the licensed pharmacist and under his direct supervision. A physician may only allow an unlicensed person to prepare and affix the label required by Section 338.059 to the prescription medication, under his supervision, and must personally perform all other aspects of the compounding and dispensing of his own prescriptions.

With respect to your third question, it necessarily follows from the foregoing analysis that a dispensing physician must personally perform the selection from inventory of the type, strength, and dosage of the drug he prescribed; he must personally verify the accuracy and completeness of the contents of the label affixed to the patient's prescription container; and he must personally verify that the drug (which he personally placed into the patient's prescription container) is in fact the drug indicated upon the prescription label. Only the physical preparation and affixing of the label to the container may be performed by another, under the physician's supervision.

In regard to the personal responsibility of a licensed pharmacist concerning the tasks described in your third question, we direct your attention to 4 CSR 220-2.010(1)(B), a rule promulgated by the Board of Pharmacy, which states:

(B) Whenever in a pharmacy, drug store, or other establishment holding a Missouri

The Honorable Robert Jackson

pharmacy permit, a person other than a licensed pharmacist does compound, dispense or sell at retail any drug, medicine or poison pursuant to a lawful prescription, a licensed pharmacist must be physically present within the confines of the dispensing area, able to render immediate assistance, and able to determine and correct any errors in the compounding, preparation or labeling of that drug, medicine or poison before said drug, medicine or poison is dispensed or sold at retail. The pharmacist shall personally inspect and verify the accuracy of the contents of, and label after it is affixed to, any prescribed drug, medicine or poison compounded or dispensed by a person other than a licensed pharmacist.

Considering this rule in connection with Sections 338.010 and 338.059, we do not believe that a licensed pharmacist must personally perform the selection from bulk inventory of the type, strength, and dosage of the drug prescribed. In the pharmacist's presence and under his direct supervision, an unlicensed assistant may perform these tasks, place the drug in an appropriate container, and prepare and affix the required label to the prescription container. However, incident to his direct supervision of the unlicensed assistant and under 4 CSR 220-2.010(1)(B), the licensed pharmacist must personally inspect and verify the accuracy and completeness of the prescription label affixed to the container, and the contents of the prescription drug container, before it is delivered or sold to the patient at retail.

#### CONCLUSION

It is the opinion of this office that a licensed pharmacist may permit an unlicensed person to perform all steps incident to compounding, dispensing, labeling, and selling prescription drugs at retail, provided that the unlicensed person acts at all times in the presence of the licensed pharmacist and under his direct supervision. A licensed pharmacist need not personally perform the selection from bulk inventory of the type, strength, and dosage of the drug prescribed, but must personally inspect and verify the accuracy and completeness of the label affixed to the prescription drug container and must verify the correctness of the contents of the drug container, before it is delivered or sold to the patient at retail.

A physician may only allow an unlicensed person to prepare and affix, under his supervision, the label required by law to a

The Honorable Robert Jackson

medication he dispenses, and must personally perform all other aspects of the compounding and dispensing of his own prescription medications. The dispensing physician must personally perform the selection from inventory of the type, strength, and dosage of the drug he prescribed; he must personally verify the accuracy and completeness of the contents of the label affixed to the patient's prescription container; and he must personally verify that the drug in the prescription container is in fact the drug indicated upon the prescription label.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Gregory W. Schroeder.

Yours very truly,

A handwritten signature in black ink, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT  
Attorney General

enclosure: Op. No. 81  
Pickrell, 1-18-62

MISSOURI HOUSING DEVELOPMENT COMMISSION:  
STATE AUDITOR:  
COMMISSIONER OF ADMINISTRATION:  
REORGANIZATION ACT:  
STATE AGENCY:  
MERIT SYSTEM:  
STATE PURCHASES:  
TRAVEL EXPENSE AND ALLOWANCES:

The Missouri Housing  
Development Commission  
may contract for inde-  
pendent auditing or  
accounting services  
without the approval  
of the state auditor;  
MHDC is not subject  
to the rules and regu-

lations concerning travel and subsistence expenses promulgated by the Office of Administration pursuant to Section 33.090, RSMo 1978; MHDC is not subject to the state purchasing act, Chapter 34, RSMo 1978; MHDC may enter into contracts with independent accounting and auditing personnel and may pay its executive director a salary higher than that specified in the Department of Consumer Affairs, Regulation and Licensing departmental plan; MHDC employees must be appointed through the merit system in accordance with (and with the exceptions noted in) Section 6, Appendix B(1), RSMo 1978.

June 22, 1982

OPINION NO. 45

The Honorable James F. Antonio, CPA  
State Auditor  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Dr. Antonio:

This is in response to your questions as follows:

1. Is the Missouri Housing Development Commission subject to 15 CSR 40-2.020, which requires that any contracts for independent auditing or accounting services entered into by state officers, agencies and institutions be submitted to the state auditor for approval?
2. Is the Missouri Housing Development Commission subject to the rules and regulations concerning travel and subsistence expenses promulgated by the commissioner of administration pursuant to Section 33.090, RSMo 1978?
3. Is the Missouri Housing Development Commission subject to the state purchasing requirements of Chapter 34, RSMo 1978?

The Honorable James F. Antonio

4. Is it legally permissible for the Missouri Housing Development Commission to hire employees by contracting directly with them rather than hiring them through the merit system? Is it legally permissible for MHDC to contract to pay the executive director a higher salary than that specified in CARL's departmental plan, approved by Governor Teasdale on March 18, 1980, found in Appendix C(1), RSMo Supp. 1980?

The General Assembly created the Missouri Housing Development Commission (MHDC) in 1969 as "a governmental instrumentality of the state of Missouri . . . which shall constitute a body corporate and politic." Section 215.020.1, RSMo 1978. From its inception until the effective date of the Omnibus State Reorganization Act of 1974 (Appendix B, RSMo 1978), May 2, 1974, MHDC was not assigned to any department of state government. The Omnibus State Reorganization Act assigned MHDC to the Department of Social Services by a type III transfer. Appendix B, Section 13.10. A type III transfer is described in Appendix B, Section 1.7(c) as:

the transfer of a . . . commission . . . to the new department with only such supervision by the head of the department for budgeting and reporting as provided under subdivisions (4) and (5) of subsection 6 of this section and any other supervision specifically provided in this act or later acts. Such supervision shall not extend to substantive matters relating to policies, regulative function or appeals from decisions of the . . . commission unless otherwise provided by this act or later acts.

On May 3, 1974, House Bill 1797, Second Regular Session, 77th General Assembly (Appendix B(1), RSMo 1978), transferred MHDC to the Department of Consumer Affairs, Regulation and Licensing (CARL). Section 1 of H.B. 1797 provides in pertinent part:

The provisions of [the Omnibus State Reorganization Act of 1974], as they relate only to the . . . state housing development commission shall not take effect as provided in that act. . . . [Emphasis added].

Thus, H.B. 1797, by its own terms, not only nullifies the type III transfer originally contemplated for MHDC, it removes MHDC entirely from the provisions of the Omnibus State Reorganization Act of 1974.

The Honorable James F. Antonio

Section 3 of H.B. 1797 provides:

The Missouri Housing Development Commission, Chapter 215, RSMo, 1972 Supplement, is assigned to the Department of Consumer Affairs, Regulation, and Licensing but shall remain a governmental instrumentality of the State of Missouri and shall constitute a body corporate and politic. [Emphasis added].

In our Opinion No. 168, Antonio, 1981, we opined that:

fees and revenues of MHDC are not subject to constitutional and statutory mandates that all state revenue and other moneys from any source whatsoever be deposited in the state treasury and that the MHDC fees and revenues are not subject to appropriation by the General Assembly.

In so ruling we stated:

[Chapter 215], coupled with the provisions creating MHDC as a governmental instrumentality constituting a body corporate and politic, make it clear that the legislature intended MHDC to be an entity distinct from the state, established for the specific purpose of providing low-income or moderate-income housing to residents of Missouri. Although MHDC represents the state in the performance of its duties, . . . it is but an instrumentality through which the state provides a service it could not otherwise provide. [Emphasis added].

H.B. 1797, Appendix B(1), Section 6, describes the relationship which exists between MHDC and CARL as follows:

All staff for . . . the Missouri Housing Development Commission shall be provided by the [director] of the [department it is] assigned to. The [director] shall appoint [a director] of staff to service . . . the Missouri Housing Development Commission. The [director] of staff shall be qualified by education, training, and experience in the technical matters of the body to which he or she is assigned and his or her appointment shall be approved by the body to which he or she is assigned, and he or she shall be removed or reassigned on their request in writing to

The Honorable James F. Antonio

the [director] of the [department]. All other employees assigned to work for . . . the Missouri Housing Development Commission except the [director] of staff, [his or her] personal [secretary], and two deputies shall be appointed by the [director] of the [department] in accord with chapter 36, RSMo 1969, and shall be assigned and may be reassigned as required by the [director] of the [department] in such manner as to provide optimum service, efficiency, and economy. [Such] body shall be charged for state costs relating to administration, under contract negotiated by [the] department and the body assigned to the department and approved by the commissioner of administration. All charges shall be payable to the state's general revenue fund.

By its passage of H.B. 1797, which nullified the type III transfer contemplated in the Omnibus State Reorganization Act for MHDC, by its requirement that MHDC contract with CARL for CARL services, and by its designation of MHDC as a governmental instrumentality and body corporate and politic, we believe the General Assembly intended that MHDC remain an entity distinct from the state except to the extent expressly provided in H.B. 1797 and in Chapter 215.

The General Assembly's treatment of the Missouri Health and Educational Facilities Authority, Chapter 360, RSMo, is instructive. The statutory scheme creating the Missouri Health and Educational Facilities Authority (HEFA) is substantially similar to that under which MHDC operates. The General Assembly stated that HEFA "is hereby constituted a public instrumentality and body corporate, . . . " Section 360.020, RSMo 1978. HEFA was created after the passage of the Omnibus State Reorganization Act and H.B. 1797, and was assigned to CARL. Section 360.140, RSMo 1978, provides:

The health and educational facilities authority is assigned to the department of consumer affairs, regulation and licensing. The authority shall, annually, on or before February first of each year, file with the director of said department a report of its previous year's income, expenditures and revenue bonds issued and outstanding.

In Menorah Medical Center v. Health and Educational Facilities Authority, 584 S.W.2d 73 (Mo. banc 1979), the Missouri Supreme Court, in construing Chapter 360, RSMo, stated:

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The Authority is not the state . . . . The Authority is established as a "body politic and corporate" which is a "public instrumentality." §360.020. Similar bodies have been adjudged as "separate entities" from the state.

\* \* \*

[T]he Authority, though it is a public body and instrumentality, is an entity apart from the state. [Emphasis added.] Id. at 78, 82.

See also State ex inf. Danforth ex rel. Farmers' Electric Cooperative, Inc. v. State Environmental Improvement Authority, 518 S.W.2d 68 (Mo. banc 1975).

Because the provisions of Chapter 360 regarding the structure and funding of the Health and Educational Facilities Authority are substantially similar to those which govern MHDC, we believe the reasoning of the Supreme Court in Menorah Medical Center applies to MHDC.

We note further that MHDC is entirely self-supporting, financing both its statutory programs and its operations out of income generated from its sale of bonds and mortgage arbitrage. Aside from the initial \$1,000,000 appropriation provided MHDC by the General Assembly as start-up capital (which MHDC has repaid the state), no general revenue is currently appropriated to fund ongoing MHDC operations.

#### I.

IS THE MISSOURI HOUSING DEVELOPMENT COMMISSION SUBJECT TO 15 CSR 40-2.020, WHICH REQUIRES THAT ANY CONTRACTS FOR INDEPENDENT AUDITING OR ACCOUNTING SERVICES ENTERED INTO BY STATE OFFICERS, AGENCIES AND INSTITUTIONS BE SUBMITTED TO THE STATE AUDITOR FOR APPROVAL?

15 CSR 40-2.020(1), promulgated by the State Auditor, provides:

No state officer, agency or institution shall enter into any agreement with any accounting or auditing firm or employ any person to perform audit functions or establish accounting systems until a copy of the contract or agreement has been approved by the state auditor in writing. [Emphasis added].

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The cited regulation applies only to state officers, agencies and institutions. However, the Supreme Court's reasoning in Menorah Medical Center and our Opinion No. 168 makes it clear that MHDC is not the state but is a separate entity from the state.

It is our opinion that 15 CSR 40-2.020(1) is not applicable to MHDC; MHDC may hire independent accountants and auditors without the approval of the state auditor.

## II.

IS THE MISSOURI HOUSING DEVELOPMENT COMMISSION SUBJECT TO THE RULES AND REGULATIONS CONCERNING TRAVEL AND SUBSISTENCE EXPENSES PROMULGATED BY THE COMMISSIONER OF ADMINISTRATION PURSUANT TO SECTION 33.090, RSMo 1978?

Section 33.090, RSMo 1978, provides:

The commissioner of administration shall be empowered to promulgate rules and regulations governing the incurring and payment of reasonable and necessary travel and subsistence expenses actually incurred on behalf of the state. [Emphasis added.]

A necessary precondition to the operation of Section 33.090 and regulations promulgated pursuant thereto is that the travel and subsistence expenses be "incurred on behalf of the state." Since under the Menorah reasoning MHDC is an entity distinct from the state, we believe Section 33.090 and regulations promulgated thereunder do not apply to MHDC.

## III.

IS THE MISSOURI HOUSING DEVELOPMENT COMMISSION SUBJECT TO THE STATE PURCHASING REQUIREMENTS OF CHAPTER 34, RSMo 1978?

Section 34.030, RSMo 1978, provides:

The commissioner of administration shall purchase all supplies for all departments of the state, except as in this chapter otherwise provided. The commissioner of administration

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shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the constitution of the state. [Emphasis added].

Section 34.010.2, RSMo 1978, defines "department" as follows:

The term "department" as used in this chapter shall be deemed to mean department, office, board, commission, bureau, institution, or any other agency of the state, except the legislative and judicial departments. [Emphasis added].

As we have previously stated we believe MHDC is an entity distinct from the state. Therefore, it is our opinion that Chapter 34 does not apply to MHDC.

#### IV.

IS IT LEGALLY PERMISSIBLE FOR THE MISSOURI HOUSING DEVELOPMENT COMMISSION TO HIRE EMPLOYEES BY CONTRACTING DIRECTLY WITH THEM RATHER THAN HIRING THEM THROUGH THE MERIT SYSTEM? IS IT LEGALLY PERMISSIBLE FOR MHDC TO CONTRACT TO PAY THE EXECUTIVE DIRECTOR A HIGHER SALARY THAN THAT SPECIFIED IN CARL'S DEPARTMENTAL PLAN, APPROVED BY GOVERNOR TEASDALE ON MARCH 18, 1980, FOUND IN APPENDIX C(1), RSMo SUPP. 1980?

Section 6, Appendix B(1), RSMo 1978, (quoted in its entirety supra) states that:

All other employees [of MHDC] except the [director] of staff, [his or her] personal [secretary], and two deputies shall be appointed by the [director] of the [department] in accord with chapter 36, RSMo 1969 [State Merit System]. [Emphasis added.]

We cannot imagine a clearer legislative expression regarding the applicability of the merit system to MHDC.

It is our understanding that MHDC utilizes the services of several independent contractors for accounting and auditing purposes. While these persons work solely for MHDC, they are independent contractors, not employees, working hours they choose and maintaining responsibility for their own income tax and Social Security withholding. As we previously stated in our answer to

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your first question, such persons may be hired without the approval of the state auditor; they provide a continuous, independent accounting service which enhances the efficiency of MHDC and the cost-effectiveness of the annual audit required under Section 215.240, RSMo 1978. We do not intend for this opinion to require that this practice cease; however, all persons who are employees of MHDC not excepted by H.B. 1797 or other provision of law must be selected in accordance to the merit system.

The departmental plan for CARL, filed March 17, 1980, and approved by Governor Teasdale March 18, 1980 (See Appendix C(1), RSMo Supp. 1981), was submitted pursuant to Section 1.6(2) of the Omnibus Reorganization Act of 1974 (Appendix B, RSMo 1978). That plan is merely an internal organization plan for CARL, formulated by the director of CARL "to promote economic and efficient administration and operation of the department." Appendix B, Section 1.6(2). It does not have the force of law nor can it amend or circumvent statutory enactments.

We believe Appendix B(1), Section 6, infers the legislature's intent with regard to the pay of the executive director of MHDC. As we earlier noted, H.B. 1797 removes MHDC from the provisions of the Omnibus State Reorganization Act. We find no authority in Appendix B(1) for the director of CARL to establish a salary for the executive director of MHDC. Absent such authority, we do not believe the director of CARL may establish such a salary.

We believe the legislature fully intended for MHDC commissioners to have great latitude in the manner in which the executive director is paid. The position is one of a technical nature which requires an executive director proficient in housing and financial matters and who is, in addition, responsive to the mission of MHDC as well as to its commissioners. In order to attract such a person, we believe MHDC must have sufficient flexibility to pay a salary commensurate with the unique talents required. Therefore, it is our opinion that the departmental plan for CARL notwithstanding, MHDC may contract to pay its executive director a salary higher than that established in Appendix C(1), RSMo Supp. 1981.

#### CONCLUSION

For the reasons stated herein, it is our opinion that:

1. The Missouri Housing Development Commission may contract for independent auditing or accounting services without the approval of the state auditor;

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2. The Missouri Housing Development Commission is not subject to the rules and regulations concerning travel and subsistence expenses promulgated by the Office of Administration pursuant to Section 33.090, RSMo 1978;

3. The Missouri Housing Development Commission is not subject to the state purchasing act, Chapter 34, RSMo 1978; and

4. The Missouri Housing Development Commission may enter into contracts with independent accounting and auditing personnel and may pay its executive director a salary higher than that specified in the Department of Consumer Affairs, Regulation and Licensing departmental plan. The Missouri Housing Development Commission employees must be appointed through the merit system in accordance with (and with the exceptions noted in) Section 6, Appendix B(1), RSMo 1978.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft".

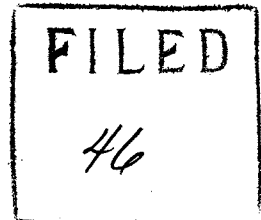
JOHN ASHCROFT  
Attorney General

CONSTITUTIONAL LAW:  
HANCOCK AMENDMENT:  
PROPERTY TAX:  
REASSESSMENT:  
TAX LEVY:  
TAXATION - TAX RATE:

Section 137.073, RSMo Supp. 1982, does not violate the provisions of Article X, Section 22(a), Missouri Constitution, unless the operation of such statute is less restrictive than the operation of Article X, Section 22(a).

December 6, 1982

OPINION NO. 46



The Honorable Marvin E. Proffer  
Representative, District 155  
Room 306, State Capitol Building  
Jefferson City, Missouri 65101

Dear Representative Proffer:

This opinion is issued in response to your request which asks:

Does Section 22(a) of Article X of the Missouri Constitution permit increases in property taxes, without voter approval, equal to the growth of the general price level even if that growth is larger than the natural growth permitted by section 137.073, RSMo, before approval of the voters is required?

The question which you pose highlights the differences in the methods by which the rates of levy are reduced in Article X, Section 22(a), Missouri Constitution, and Section 137.073, RSMo Supp. 1982.

Article X, Section 22(a), adopted November 4, 1980, provides in relevant part:

If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the general price level from the previous year, the maximum authorized current levy applied thereto in each county or political subdivision shall be reduced to yield the same gross revenue from existing property, adjusted for changes

The Honorable Marvin E. Proffer

in the general price level, as could have been collected at the existing authorized levy on the prior assessed value.

Section 137.073, as amended by the General Assembly in 1979, provides in relevant part:

1. As used in this section, the following terms mean:

\* \* \*

(2) "Preceding valuation factor", a percentage increase or decrease based on the average of the annual percentage changes in total assessed valuation of a political subdivision over the previous three or five years, whichever is greater  
.....

\* \* \*

2. Whenever changes in assessed valuation that result from a general reassessment of real property within the county are entered in the assessor's books, the county clerk in all counties and the assessor of St. Louis City shall notify each political subdivision wholly or partially within the county of the change in valuation, and each political subdivision wholly or partially within the county, including municipalities maintaining their own tax books, shall immediately revise the rates of levy for each purpose for which taxes are levied to the extent necessary to produce from all taxable property substantially the same amount of tax revenue as was produced in the previous year and, in addition thereto, a percentage of the previous year's revenues equal to the preceding valuation factor of the political subdivision.

3. Whenever the assessed valuation of real or real and personal property combined within a political subdivision or taxing authority has increased by ten percent or more over the prior year's valuation by action other than a general reassessment, the political subdivision or taxing authority shall immediately revise and lower the rates of levy for each purpose for which taxes are levied to the extent necessary to produce from all taxable property substantially the same

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amount of tax revenue as set forth in estimates filed by school districts for the current year as required by section 164.011, RSMo, or as estimated in the annual budget for the fiscal year adopted in accordance with chapters 50 and 67, RSMo, by political subdivisions other than school districts. The lower rate of levy as determined by the taxing authority, or when a court has determined the tax rate reduction, shall then be recertified to the county clerk.

A comparison of the material provisions of the above-cited authorities indicates that the constitutional provision mandates a reduction in the rates of levy if the assessed value of property, as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the general price level from the previous year<sup>1</sup>. Once this occurs, the actual levy reduction is effectuated by reducing the maximum authorized current levy to yield the same gross revenue as generated by the prior assessed value adjusted for changes in the Consumer Price Index.

Section 137.073.2 directs a revision in the rates of levy to limit revenue to that produced before general reassessment of real property augmented through an adjustment that adds a percentage of the prior year's revenues equal to the "preceding valuation factor."

Section 137.073.3 is activated whenever the assessed valuation of property has increased by ten percent or more over the previous year's valuation by action other than general reassessment. When that happens, the political subdivision or taxing authority is required to revise and lower the rates of levy for each purpose for which taxes are levied to the extent necessary to produce from all taxable property substantially the same amount of tax revenue as set forth in certain estimates required to be made by other statutes.

The purpose of the Hancock Amendment is to limit taxes and governmental expenditures. Buchanan v. Kirkpatrick, 615 S.W.2d 6, 13-14 (Mo. banc 1981). There is nothing in that amendment which indicates any intention on the part of the people to limit the authority of the legislature to enact more restrictive taxing limits, as Section 137.073 does. Unless a statute is clearly repugnant to organic law, its constitutionality must be upheld. State ex rel. State Highway Commission v. Paul, 368 S.W.2d 419 (Mo. banc 1963).

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<sup>1</sup>"General price level" is defined in Article X, Section 17(3), Missouri Constitution (as adopted 1980), as the Consumer Price Index for All Urban Consumers for the United States.

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Clearly, a statutory provision which places a greater restriction than is constitutionally required is not repugnant to, but is in harmony with, Article X, Section 22(a).

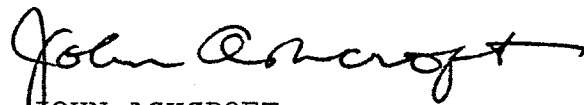
Further, the Hancock Amendment did not repeal Article X, Section 10(c), Missouri Constitution, which provides that the General Assembly may require that political subdivisions reduce the rate of levy of property taxes imposed by such subdivisions, "whether the rate of levy is authorized by [the] constitution or by law." A construction which renders meaningless any provisions of the Constitution should not be adopted. State ex rel. Moore v. Toberman, 250 S.W.2d 701 (Mo. banc 1952).

For the foregoing reasons, we conclude that the statutory provision in question is constitutional to the extent that its operation is more restrictive than that of Article X, Section 22(a). Only where the provisions of Article X, Section 22(a) operate more restrictively than the statute would the constitutional provision prevail.

#### CONCLUSION

It is the opinion of this office that Section 137.073, RSMo Supp. 1982, does not violate the provisions of Article X, Section 22(a), Missouri Constitution, unless the operation of such statute is less restrictive than the operation of Article X, Section 22(a).

Very truly yours,



JOHN ASHCROFT  
Attorney General

STATE CONTRACTS:  
DEPARTMENT OF MENTAL HEALTH:

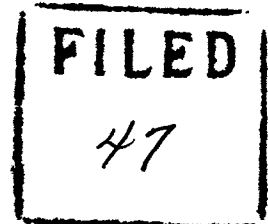
The Department of Mental  
Health under Section 630.640,  
RSMo Supp. 1981, must  
require vendors receiving

Department funds through contract to utilize Section 8 housing  
assistance payments (14 U.S.C. § 1437f) before using state  
funds. However, because county or St. Louis City funds derived  
through Section 205.968, RSMo 1978 et seq., and philanthropic  
funds such as those received from the United Way or other fund  
raising activities, are not "public assistance benefits" for  
purposes of Section 630.640, RSMo Supp. 1981, the Department of  
Mental Health may not require such vendors to utilize these  
moneys before charging the state for client services.

March 19, 1982

OPINION NO. 47  
(corrected)

Paul R. Ahr, Ph.D., M.P.A.  
Director  
Department of Mental Health  
2002 Missouri Boulevard  
Jefferson City, Missouri 65101



Dear Dr. Ahr:

This opinion is rendered in response to your request which  
asks the following question:

Does the Department of Mental Health  
have the authority to require any vendor  
receiving Department funds through contract  
to utilize the following listed funding  
sources first before charging the state for  
any client services?

1. Federal Housing Assistance Payment  
Program funds received by persons or organi-  
zations under Section 8 of the Housing and  
Community Development Act of 1974;

2. County (including St. Louis City)  
funds allocated for programs for handicapped  
persons pursuant to section 205.968, RSMo  
1978, et seq.;

Paul R. Ahr, Ph.D., M.P.A.

3. Philanthropic funds received by non-profit providers such as contributions from the United Way or from other fund raising activities?

Relevant hereto is the Department's placement program provided for in Section 630.605, RSMo Supp. 1981, et seq. Section 630.605 provides:

The department shall establish a placement program for persons affected by a mental disorder, mental illness, mental retardation, development disability or alcohol or drug abuse. The department may utilize residential facilities, day programs and specialized services which are designed to maintain a person who is accepted in the placement program in the least restrictive environment in accordance with the person's individualized treatment, habilitation or rehabilitation plan. The department shall license, certify and fund, subject to appropriations, a continuum of facilities, programs and services short of admission to a department facility to accomplish this purpose.

Additionally, it is observed that Section 630.640, RSMo Supp. 1981, specifies the Department's responsibility to pay for client services:

1. If a client receiving services under this chapter is ineligible for public assistance benefits from any source, or such benefits are inadequate to meet the costs of such services, his monthly costs shall be paid or supplemented out of funds appropriated for that purpose to the department.

2. If payments for the support and maintenance of the client are made from funds appropriated to the department, the department shall charge the client or those responsible for his support under this chapter for his support and maintenance pursuant to sections 630.205 to 630.215. [Emphasis added.]

Paul R. Ahr, Ph.D., M.P.A.

The term "public assistance benefits" is somewhat amorphous eluding exact definition. However, for the purpose of answering the specific questions posed herein, reference is made to a relevant and dispositive characteristic of public assistance, to-wit: Entitlement.

Generally speaking, welfare assistance pursuant to legislative provision is a matter of statutory entitlement for persons qualified to receive it, as distinguished from charity, and benefits are not intended as gifts. Accordingly, if a person meets the requirements prescribed by statute under an assistance program, the welfare agency is obligated to recognize his claim. [Emphasis added.]

81 C.J.S., Social Security and Public Welfare, § 2 (1977).

It is our view that philanthropic funds such as those received from the United Way or other fund raising activities clearly are not public assistance benefits. Such funds are charitable in nature and not public tax moneys. There is no statutory entitlement thereto.

Section 8 housing funds (42 U.S.C. § 1437f), however, constitute a government program expending public tax funds in the form of cash payments (rent subsidies) to landlords on behalf of poor persons meeting the specified eligibility requirements. The program has as its purpose "aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing, . . . ." 42 U.S.C. § 1437f(a).

Additionally, Section 8 financial aid is a matter of entitlement:

It is apparent, from the statutory language and the regulations promulgated to effect the Act, that the purpose of the Act is to enable poor and elderly persons, like plaintiff, to take full advantage of housing assistance offered by the federal government.

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Benefits like those provided under the Act are a matter of statutory entitlement, for persons qualified to receive them, and those persons must receive due process before the benefits are terminated. [Emphasis added.]

Brezina v. Dowdall, 472 F.Supp. 82, 85 (N.D.Ill. 1979).

Because Section 8 is an entitlement program, it is our conclusion that the benefits thereunder are "public assistance benefits" as the phrase is used in Section 630.640, RSMo Supp. 1981.

County sheltered workshops are authorized in Section 205.968, RSMo 1978:

1. The county court or other governing body of any county or city not within a county in this state may establish a sheltered workshop and/or residence facility for the care and/or employment of handicapped persons. The facility may operate at one or more locations in the county or city not within a county. [Emphasis added.]

2. The facility shall be operated for handicapped persons as defined in section 178.900, RSMo, who are employed at the facility or in the community and/or for persons who are handicapped due to a developmental disability, where the disability is attributable to mental retardation, cerebral palsy, epilepsy, or other neurological conditions which are closely related to mental retardation or require treatment similar to mental retardation.

Tax levies for county sheltered workshops are authorized in Section 205.971, RSMo 1978:

The county court or other governing body of the county or city not within a county may, upon approval of a majority of the qualified voters of such county or city not within a county voting thereon, levy and collect a tax not to exceed two mills per dollar of assessed valuation upon all taxable property within the county or city not within a county for the purpose of

Paul R. Ahr, Ph.D., M.P.A.

establishing and maintaining the county or city sheltered workshop and/or residence facility. The tax so levied shall be collected along with other county taxes, or in the case of a city not within a county, with other city taxes, in the manner provided by law. All funds collected for this purpose shall be deposited in a special fund for the facility, and shall be used for no other purpose. Deposits in the fund shall be expended only upon approval of the facility's board of directors.

An appointive board of directors is granted broad discretion under Section 205.970.2, RSMo Supp. 1981, in the operation of a facility:

The administrative control and management of the facility shall rest solely with the board of directors, and the board shall employ all necessary personnel, fix their compensation, and provide suitable quarters and equipment for the operation of the facility from funds made available for this purpose.

Additionally, the board possesses discretion in the admission of persons to the facility under Section 205.970.5, RSMo Supp. 1981:

The board shall set rules for admission to the facility, and shall do all other things necessary to carry out the purposes of sections 205.968 to 205.972.

It is our view, because of the broad discretion granted to the board of directors to manage and administer the tax levy funds, including the authority to set admission criteria, that the General Assembly, in enacting Sections 205.968, et seq, did not establish therein a program properly classified as a public assistance benefit. Although the legislature did establish eligibility requirements for participation in the programs, there exists no evidence of an intent to establish an entitlement program. On the contrary, the General Assembly granted discretion to the local boards to establish rules for admission. Moreover, Section 205.968, supra, makes the establishment of such a workshop discretionary, there being no statutory mandate that each county create and operate a sheltered workshop or residence facility.

Paul R. Ahr, Ph.D., M.P.A.

#### CONCLUSION

Therefore, it is the opinion of this office that the Department of Mental Health under Section 630.640, RSMo Supp. 1981, must require vendors receiving Department funds through contract to utilize Section 8 housing assistance payments (14 U.S.C. § 1437f) before using state funds. However, because county or St. Louis City funds derived through Section 205.968, RSMo 1978, et seq., and philanthropic funds such as those received from the United Way or other fund raising activities, are not "public assistance benefits" for purposes of Section 630.640, RSMo Supp. 1981, the Department of Mental Health may not require such vendors to utilize these moneys before charging the state for client services.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Edwin H. Steinmann.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft".

JOHN ASHCROFT  
Attorney General

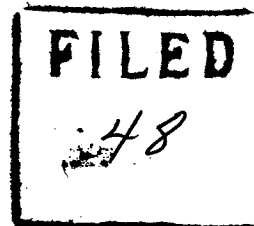
CRIMINAL PROCEEDINGS:  
CRIMINAL PROCEDURE:  
CRIMINAL LAW:  
INFORMATION:  
INDICTMENTS:  
ARRAIGNMENT:

The time limits prescribed in Section 545.780, RSMo 1978, (1) do not apply to felony cases pending in associate circuit court awaiting preliminary hearings, (2) do apply to misdemeanor cases pending in associate circuit court awaiting trial, and (3) do not apply to ordinance violations where convictions have been obtained in the city's municipal court and thereafter appealed to associate circuit court.

April 27, 1982

OPINION NO. 48

The Honorable David A. Geisler  
Prosecuting Attorney  
Greene County Courthouse  
Springfield, Missouri 65802



Dear Mr. Geisler:

This opinion is in response to your question asking:

Whether the time limitations set forth in 545.780, RSMo are applicable to:

- (1) Felony cases pending in Associate Circuit Court awaiting preliminary hearings
- (2) Misdemeanor cases pending in Associate Circuit Court awaiting trial
- (3) Ordinance violations where convictions have been obtained in the city's municipal court and thereafter appealed to Associate Circuit Court.

Section 545.780,<sup>1</sup> establishes certain time limitations relating to criminal prosecutions. In relevant part, that section provides:

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<sup>1</sup>All statutory references herein are to RSMo 1978.

The Honorable David A. Geisler

1. The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within ten days from the filing of the information or the making public of the indictment.

2. When a plea of not guilty is entered at an arraignment the trial shall commence within one hundred eighty days of arraignment.

We answer part (1) of your question in the negative. We believe it is clear that as to a defendant charged in an information with the commission of an offense, the provisions of Section 545.780 are not operative until the filing of the information. In felony cases, no information shall be filed until after the accused is accorded the right of a preliminary hearing in associate circuit court. Section 544.250. Since the preliminary hearing must precede the filing of a felony information, the time limitations imposed under Section 545.780 do not apply to felony cases awaiting preliminary hearing.

Part (2) of your question is answered in the affirmative. Section 545.780 applies whenever a defendant is charged with the commission of an offense. Section 556.061(18) defines "offense" as "any felony, misdemeanor or infraction." Thus, whenever an information has been filed or an indictment returned in a misdemeanor case, an arraignment must be held within ten days and the trial must commence within 180 days of arraignment.

We answer part (3) of your question in the negative. Section 479.200 gives a defendant tried before a municipal judge the right to a trial de novo before a circuit judge or associate circuit judge. Whether the time limits in Section 545.780 apply to a trial de novo in associate circuit court of a municipal ordinance violation depends upon whether such violation is an "offense" as contemplated in Section 545.780.

An infraction is defined in Section 556.021.1 as "[a]n offense defined by this code or by any other statute of this state. . . ." Since violations of municipal ordinances are defined by those ordinances, and not by any statute of the State of Missouri, they are not infractions within the meaning of Section 556.021.1 nor are they felonies or misdemeanors. Therefore, such violations are not "offenses" within the meaning of Section 545.780.

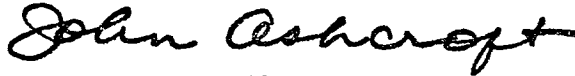
The Honorable David A. Geisler

CONCLUSION

It is the opinion of this office that the time limits prescribed in Section 545.780, RSMo 1978, (1) do not apply to felony cases pending in associate circuit court awaiting preliminary hearings, (2) do apply to misdemeanor cases pending in associate circuit court awaiting trial, and (3) do not apply to ordinance violations where convictions have been obtained in the city's municipal court and thereafter appealed to associate circuit court.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Jay D. Haden.

Very truly yours,

A handwritten signature in cursive script that reads "John Ashcroft".

JOHN ASHCROFT  
Attorney General

*Attorney General of Missouri*

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT  
ATTORNEY GENERAL

(314) 751-3321

February 25, 1982

OPINION LETTER NO. 51

Dr. Arthur L. Mallory  
Commissioner of Education  
Department of Elementary and Secondary Education  
Jefferson State Office Building  
Jefferson City, Missouri 65101

FILED

51

Dear Dr. Mallory:

This opinion letter is issued in response to your request for a ruling on the following questions:

- I. May the Department of Elementary and Secondary Education or the public school districts of Missouri use funds available to them under Chapter 2 of the Education Consolidation and Improvement Act of 1981 to provide, directly or through other arrangements, each of the following services to children attending non-public schools and their teachers:
  - (1) the loaning of library resources, textbooks, instructional materials, instructional equipment, and testing materials for use by students and teachers on nonpublic school premises;
  - (2) the provision of training for teachers or special or regular instructional services, including but not limited to remedial, diagnostic, enrichment, and guidance and counseling services by publicly paid persons on the premises of nonpublic schools.

Dr. Arthur L. Mallory

- II. May the Department of Elementary and Secondary Education provide in its Application for Funds under Chapter 2 of the Education Consolidation and Improvement Act of 1981, the assurance that it will comply with all provisions of Chapter 2, including section 586 relating to the participation of pupils and teachers in nonpublic elementary and secondary schools, as required by section 564(a)(7) of that Act.

The questions you have presented are similar to the questions we answered with respect to the Elementary and Secondary Education Act of 1965 in Opinion No. 102, Mallory, May 16, 1977. Although Opinion No. 102 answered a request concerning predominantly the provision of materials to children attending nonpublic schools, it concluded that under Missouri law, the public school districts of Missouri could not use funds available to them under Part B of Title IV of the Elementary and Secondary Education Act of 1965, as amended by Public Law 93-380, to provide either materials or services to children attending nonpublic schools. It concluded, further, that under Missouri law the Department of Elementary and Secondary Education could not provide the assurances required by Section 406 of that Act.

Chapter 2 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C §§ 3811-3863, provides, in part, for a grant of benefits to children enrolled in private schools similar to the benefits provided for in Part B of Title IV of the Elementary and Secondary Education Act of 1965, as amended by Public Law 93-380, 20 U.S.C. § 1821. In addition, both laws call for the provision of assurances by the state that the funds will be used to benefit children attending nonpublic schools. Compare Section 403(a)(3) of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 1803(a)(3), with Section 564(a)(7) of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. § 3814(a)(7).

Based on the rationale of Opinion No. 102, which we hereby affirm, it is clearly impermissible for either the Department of Elementary and Secondary Education or the public school districts in this state to use funds available to them under Chapter 2 of the Education Consolidation and Improvement Act of 1981 to provide the materials or services described therein to nonpublic school children on nonpublic school premises. Whether dispersed by the Department of Elementary and Secondary Education, or by the public school districts, the funds in question are paid into the state

Dr. Arthur L. Mallory

treasury, where they become public funds of the state which may not be spent for purposes prohibited by the Missouri Constitution. See Section 563(a) of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. § 3813. Neither may the Department of Elementary and Secondary Education provide assurances pursuant to Section 564(a)(7) of that Act, 20 U.S.C § 3814(a)(7), that the funds will be used to benefit children attending nonpublic schools as required by Section 586, 20 U.S.C § 3862.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long, sweeping horizontal line extending to the right.

JOHN ASHCROFT  
Attorney General

Enclosure: Opinion No. 102 (1977)

*Attorney General of Missouri*

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

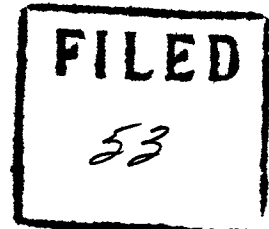
JOHN ASHCROFT  
ATTORNEY GENERAL

(314) 751-3321

April 5, 1982

OPINION LETTER NO. 53

John A. Pelzer  
Commissioner  
Office of Administration  
Post Office Box 809  
Jefferson City, Missouri 65102



Dear Commissioner Pelzer:

This opinion letter is in response to a request submitted by your predecessor in office, as follows:

Providing that the duties of the city office are not in conflict with his duties as a state employee, may an employee of the State of Missouri who is covered under the provisions of Section 36.150.5 RSMo be a candidate for nomination or election to an elective city office of the City of Jefferson, Missouri without resigning or obtaining a regularly granted leave of absence?

Section 36.150, RSMo Supp. 1981, provides, in pertinent part:

5. No employee selected under the provisions of this law shall be a member of any national, state, or local committee of a political party, or an officer of a partisan political club. He shall take no part in the management or affairs of any political party or in any partisan political campaign. No such employee shall be a candidate for nomination or election to any partisan public office or nonpartisan office in conflict with his duties except he resign, or obtain a regularly granted leave of absence, from his position. [Emphasis added.]

John A. Pelzer

Thus, your question requires a determination of whether an elective city office in Jefferson City is a "partisan" office or a "nonpartisan" office.

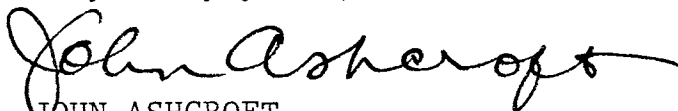
You have enclosed a copy of Ordinance No. 9715 of the City of Jefferson, Missouri, relative to city elections, which was approved by the mayor on December 21, 1981. Section 14-12, pertaining to the nomination of candidates, provides that a candidate for city office may designate on the nominating petition an affiliation or membership in any political party organized or recognized under the laws of the State of Missouri. If a candidate does not desire to so designate a membership in a political party, he may set out on the nominating petition that he seeks office as an independent. That section further provides that every candidate for city office, excluding candidates for membership to the city committee of any political party and independent candidates, shall pay to the treasurer of the city committee of the party of which the candidate is affiliated the sum of \$5.00 and take a receipt therefor. Section 14-17 provides that should the candidate designate a membership in a political party, or an independent status, the designation shall appear on the ballot in an unabbreviated form next to the candidate's name.

We observe that for purposes of the Comprehensive Election Act of 1977, Chapter 115, RSMo, the term "nonpartisan" is defined to mean "a candidate who is not a candidate of any political party and who is running for an office for which party candidates may not run." Section 115.013(16), RSMo Supp. 1981.

We believe that the term "nonpartisan office" as used in Section 36.150.5 means an office for which candidates may not run by political party affiliation and, conversely, the term "partisan public office" as used therein means an office for which candidates may run by political party affiliation.

Therefore, it is our view that the elective city offices in Jefferson City are "partisan public offices" and are not "nonpartisan offices" within the meaning of Section 36.150.5, and that a merit system employee who becomes a candidate for any such elective city office, whether as a candidate with party affiliation or as an independent candidate, will be in violation of Section 36.150.5 unless he resigns or obtains a regularly granted leave of absence from his position.

Very truly yours,

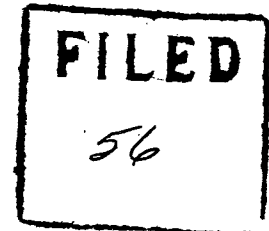
A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, flowing script.

JOHN ASHCROFT  
Attorney General

SENATE: Where state senatorial districts have not  
FILING: been established by reapportionment for one  
CANDIDATES: year next before the general election,  
REDISTRICTING: under Article III, Section 6, Missouri  
REAPPORTIONMENT: Constitution, a candidate for the office of  
state senator must have resided for one year  
next before the day of election in some portion of any former district  
or districts from which the new district shall have been taken.

March 16, 1982

OPINION NO. 56



The Honorable Richard M. Webster  
Senator, District 32  
Room 331, State Capitol Building  
Jefferson City, Missouri 65101

Dear Senator Webster:

This opinion is in response to your question concerning residency requirements for candidates for the office of state senator in elections for which the state senatorial districts have not been established by reapportionment for one year prior to the next general election.

Article III, Section 6, Missouri Constitution, provides:

Each senator shall be thirty years of age, and next before the day of his election shall have been a qualified voter of the state for three years and a resident of the district which he is chosen to represent for one year, if such district shall have been so long established, and if not, then of the district or districts from which the same shall have been taken.

The Judicial Commission Senate Plan was filed November 16, 1981, and, therefore, established the new districts less than one year prior to the next general election.

The Honorable Richard M. Webster

It is our interpretation that Article III, Section 6, means that a candidate would be qualified as to residency if he was a resident for one year next before the day of his election of any part of any former district or districts from which the new district was formed.

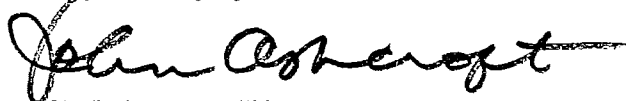
You have also asked concerning the applicability of State ex rel. Gralike v. Walsh, 483 S.W.2d 70 (Mo. banc 1972) to the circumstances described above. In Gralike, the Missouri Supreme Court sustained the constitutionality of the one year residency requirement of Article III, Section 6. In the present situation, because the districts have not been established for one year before the election, the provisions of Article III, Section 6, create an exception to the requirement that the candidate have a year's residency within the district. Obviously, the residency requirement still exists with respect to the old districts from which the new district has been taken.

#### CONCLUSION

It is the opinion of this office that where state senatorial districts have not been established by reapportionment for one year next before the general election, under Article III, Section 6, Missouri Constitution, a candidate for the office of state senator must have resided for one year next before the day of election in some portion of any former district or districts from which the new district shall have been taken.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized flourish at the end.

JOHN ASHCROFT  
Attorney General

*Attorney General of Missouri*

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

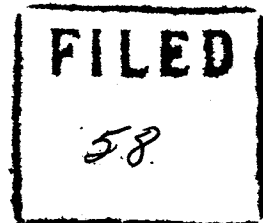
JOHN ASHCROFT  
ATTORNEY GENERAL

(314) 751-3321

February 25, 1982

OPINION LETTER NO. 58

The Honorable James C. Kirkpatrick  
Secretary of State  
State of Missouri  
Room 209 State Capitol Building  
Jefferson City, Missouri 65101



Dear Mr. Secretary:

This letter is in response to your questions asking as follows:

1. In counties where more than one associate circuit judge is to be elected should the candidates file for the position of associate circuit judge by division, such as division I, II, III, etc., or do they file only as associate circuit judges?

2. If your answer to the above is that they do not file by division or district is the ballot for the Primary and General election to be entitled: associate circuit judge (one to be elected) if only one is elected in the county; (two to be elected) if two are to be elected; (three to be elected) if three are to be elected, etc.?

3. If your answer is yes to number one, is it necessary for the candidates to file by district or by division?

4. If your answer is yes to questions three, do those candidates who have already filed without naming the district or division, need to refile by district or division prior to the close of the filing date of April 27, 1982?

The Honorable James C. Kirkpatrick

5. If your answer is yes to question No. 2, are the candidates names listed on the ballot in the order of their filing?

In answer to your first question which asks whether candidates for the office of associate circuit judge in counties which have more than one associate circuit judge should file by division or generally for the office of associate circuit judge, it is our view that the candidates should file by division. In this respect we note that Article V, Section 27, Missouri Constitution--the schedule to the judicial article--provides that the former magistrate courts and the former probate courts became "divisions of the circuit court" on January 2, 1979. Further, it seems clear that the legislature has considered the associate circuit judge divisions as separate divisions in the appointment of division clerks, Section 483.245, RSMo Supp. 1981, and in the various distinctions drawn between associate circuit judge probate division and the other associate circuit judge divisions by a number of statutory provisions. See, for example, Section 478.018.2, RSMo Supp. 1981.

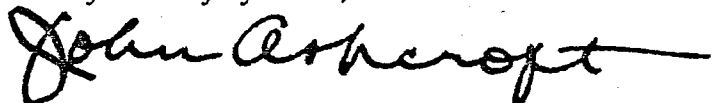
In those jurisdictions in which associate circuit divisions have not been previously identified, the election authority should establish appropriate identification of the divisions for election purposes.

In answer to your third question, it is our view that the candidates should file by division and not by districts.

In answer to your fourth question, it is our view that, in these peculiar circumstances, those candidates who have not filed by division should be allowed to amend their declarations to indicate the divisional office for which they intended to file; such amendment must be done before the expiration of the time for filing under Section 115.349, RSMo.

In answer to your fifth question, candidates who so amend their declarations should be allowed to retain their places on the ballot as of the time of filing notwithstanding any such amendment.

Very truly yours,



JOHN ASHCROFT  
Attorney General

*Attorney General of Missouri*

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

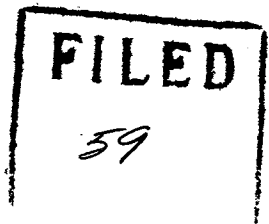
JOHN ASHCROFT  
ATTORNEY GENERAL

(314) 751-3321

April 15, 1982

OPINION LETTER NO. 59

The Honorable William Steinmetz  
Representative, District 91  
12629-A Sauterne  
St. Louis, Missouri 63141



Dear Representative Steinmetz:

This replies to your request for an opinion on the subject of tax levies in the Special School District of St. Louis County. Your inquiry states:

On August 3, 1976 at a special election the voters of the Special School District of St. Louis County approved a tax increase of twenty cents. The wording of the ballot specifically stated that the levy was to be collected "for one year" (see exhibit "A"). On April 6, 1976 the voters of the same district failed to approve a bond issue and levy for construction of a vocational school. The Special School District of St. Louis County has continued to collect the twenty cent levy increase even though the ballot specifically stated the levy was to last only one year. QUESTION: Is it lawful to continue to collect the tax when the ballot contains a termination date in the express approval of the levy? When the ballot specifically indicates the revenues will be expended for specific purposes can the funds be expended for another purpose, i.e., the construction of a vocational school?

At the outset, we must confess our amazement that it has been declaimed in some quarters that whatever we conclude in response to your request will be decisive of the present controversy surrounding the tax levy of the Special School District and will determine

The Honorable William Steinmetz

future actions taken by its board of directors.<sup>1</sup> In actuality, the question of the effect of a time limitation placed on a school tax levy has already been answered by the Missouri Supreme Court in a unanimous decision handed down on July 14, 1981, and, more recently, by the Missouri Court of Appeals, Southern District, in an opinion filed January 6, 1982. It strains credulity to suppose that those cases have gone unnoticed or that their teachings have eluded apprehension by school boards and administrators, and their counsel, or that such persons would expect that our views would be contrary to the decisions so recently issued from the appellate bench. Moreover, for more than six weeks we awaited some expression of the District's legal position on the questions you posed, which we invited and which counsel for the District indicated would be provided.

In Ederer v. Dalton, 618 S.W.2d 644 (Mo. banc 1981), the Supreme Court of Missouri ruled that a school district could not continue to levy, for more than two years, an increase in the tax rate which the voters had approved for only a two-year period. The court stated that Article X, Section 11(c) of the Missouri Constitution:

cannot reasonably be read, . . . to permit indefinite continuation of a tax rate approved by the voters for a limited period of time. To permit such a continuation would defeat the expectations of the voters. It would in effect be a fraud on those voters who were in favor of an increase, but only because of a belief it would be in effect for a limited period. The 1970 amendment must therefore be read to permit an increase to continue indefinitely only when no time limit has been placed on its duration.

\* \* \*

Had no time limit been placed on the levy, it would have continued indefinitely pursuant to Mo.Const. art. X, § 11(c); but by placing a

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<sup>1</sup>School boards are authorized to place on leave, without pay, at any time, as many teachers as may be necessary because of the financial condition of the school district. Section 168.124, RSMo 1978; Frimel v. Humphrey, 555 S.W.2d 350 (Mo.App. 1977).

The Honorable William Steinmetz

two year limitation on the \$.98 increase approved in 1976, that levy expired at the end of the 1978 school year. If the school board wished to continue to levy a tax rate of \$3.63, it was required to submit the proposition to the voters. . . . Id. at 646.

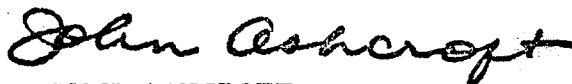
Similarly, in Southwestern Bell Telephone Co. v. Wickliffe, No. 12242 (filed January 6, 1982), the Missouri Court of Appeals held that Article X, Section 11(c), Missouri Constitution, does not permit indefinite continuation of a tax levy authorized for a period of two years, stating at page 8 of the slip opinion:

A reasonable application of Art. X, § 11 (c) requires that the tax rate should not be extended beyond the time represented to the public. Extremely clear language in the Missouri Constitution would be required before we would say that a provisions in it would allow the voters to be misled by the language in the documents preliminary to election, the notice of election, and the ballot. . . . The authorization under Art. X, § 11(c), to continue the last approved tax rate can only reasonably mean the last tax rate approved without any time limitation.

The holdings in Ederer and Southwestern Bell are dispositive of your first question.

We believe your second question is answered by our Opinion Letter No. 123 (1979), a copy of which is enclosed. See also, Section 165.021, RSMo 1978.

Very truly yours,



JOHN ASHCROFT  
Attorney General

Enclosure: Opinion No. 123 (1979)

*Attorney General of Missouri*

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT  
ATTORNEY GENERAL

(314) 751-3321

March 25, 1982

OPINION LETTER NO. 61

Dr. Arthur L. Mallory  
Commissioner of Education  
State Board of Education  
Post Office Box 480  
Jefferson City, Missouri 65102



Dear Dr. Mallory:

At your request we have reviewed the Department's fiscal year 1983 Application for Federal Assistance under Title I of the Elementary and Secondary Education Act of 1965, as amended, for the provision of educational services to educationally deprived children of migratory agricultural workers and fishermen.

We have considered relevant provisions of the Elementary and Secondary Education Act of 1965, as amended, including the regulations issued thereunder, as well as Article III, Section 38(a), Missouri Constitution (1945), and Section 161.092, RSMo 1978.

This letter constitutes our official certification that the Missouri Department of Elementary and Secondary Education has the authority under state law to perform the duties and functions of a "State educational agency" as defined in Title I of Public Law 89-10 [20 U.S.C. § 244(7)], including those arising from the assurances set forth in the application.

Very truly yours,

JOHN ASHCROFT  
Attorney General

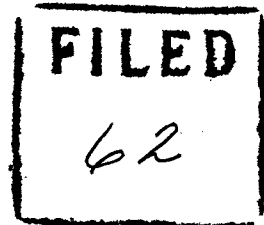
SPECIAL BUSINESS DISTRICT:  
CITIES, TOWNS AND VILLAGES:

A petition by property owners to  
establish a special business  
district under Section 71.794,

RSMo, cannot limit the authority of the district to levy taxes pursuant to Section 71.800, RSMo, although the district is not required to levy such taxes.

March 22, 1982

OPINION NO. 62



The Honorable Harry Hill  
Representative, District 2  
State Capitol Building  
Jefferson City, Missouri 65101

Dear Representative Hill:

This opinion is in response to your questions asking:

(1) Does a Petition for the organization of a Special Business District [under Sections 71.790, et seq., RSMo], which expressly states that a property tax is not desired or is silent with regard to the imposition of such a property tax, effectively limit the imposition of such a property tax pursuant to the authority contained in Section 71.800 by the district subsequent to the formation of said district?

(2) Can the City Council, in enacting an ordinance establishing a Special Business District, expressly prohibit the district from imposing such a property tax pursuant to the authority contained in Section 71.800, by so stating in the ordinance, thus creating a Special District which only has the power to impose one of the two taxes authorized by Section 71.800?

Section 71.790, RSMo, authorizes the governing body of any city to establish special business districts in the manner provided by law, and provides that upon establishment each such district shall be a body corporate and politic and a political subdivision of the state.

The Honorable Harry Hill

Section 71.794 provides that upon receipt of a petition by one or more owners of real property on which is paid the ad valorem real property taxes within the proposed district, the governing body of the city may adopt a resolution of intention to establish a special business district. The resolution must contain certain information, including the proposed uses to which the additional revenue shall be put and the initial tax rate to be levied. If the governing body following a hearing decides to establish the proposed district, it must adopt an ordinance to that effect containing a statement that the property in the area established by the ordinance shall be subject to the provisions of additional tax, the initial rate of levy to be imposed upon the property lying within the boundaries of the district, and the uses to which the additional revenue shall be put.

Section 71.798 provides that the governing body of the city creating the district shall have the sole discretion as to how the revenue derived from any tax to be imposed shall be used within the scope of the purposes of the district.

Section 71.800 provides that the district may impose a tax upon the owners of real property within the district which shall not exceed 85¢ on the \$100.00 assessed valuation. It also provides that the district may impose an additional tax on businesses and individuals doing business within the district, but if the governing body imposes any business license taxes, such additional taxes shall not exceed 50% of the business license taxes.

We previously concluded in Opinion Letter No. 269, Snyder, 1973, that the governing body of the city is also the governing body of the special business district.

It is our view that the General Assembly clearly intended that a special business district, as a body corporate and politic and a political subdivision of the state, should be clothed with all of the statutory powers expressly granted in Sections 71.796 and 71.800, and that such powers cannot be abrogated or diminished by any purported limitation in the initiating petition. Although a special business district derives its existence from the actions of the petitioner(s) and the governing body of the municipality, it derives its powers from the legislature and not from the petitioner(s) or the governing body. Thus, it seems clear that Section 71.794 does not authorize the petitioner(s) to limit the powers of the district by any restrictive provisions in the petition submitted pursuant to that section.

The Honorable Harry Hill

The governing body is not required to impose the taxes authorized in Section 71.800 since the authority given in that section is permissive and not mandatory. It is also our view that the city council could not by ordinance preclude itself or succeeding councils from levying any such taxes.

CONCLUSION

It is the opinion of this office that a petition by property owners to establish a special business district under Section 71.794, RSMo, cannot limit the authority of the district to levy taxes pursuant to Section 71.800, RSMo, although the district is not required to levy such taxes.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in cursive script that reads "John Ashcroft". The signature is written in dark ink and is positioned above the printed name and title.

JOHN ASHCROFT  
Attorney General

*Attorney General of Missouri*

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

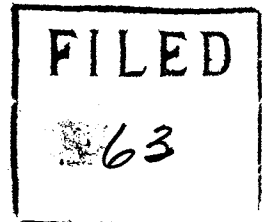
(314) 751-3321

JOHN ASHCROFT  
ATTORNEY GENERAL

March 16, 1982

OPINION LETTER NO. 63

Mr. Fred A. Lafser  
Director, Missouri Department  
of Natural Resources  
1915 Southridge Plaza  
Jefferson City, MO 65101



Dear Mr. Lafser:

This letter, and the attached Memorandum Opinion which was prepared by my assistant, Kirk Lohman, and which I approve, constitute the Attorney General's Statement required by 40 CFR 123.5 as part of the Application for Authorization submitted to the U.S. Environmental Protection Agency by the Missouri Department of Natural Resources, pursuant to 40 CFR 123, Subpart C.

I hereby certify, pursuant to my authority as Attorney General of the State of Missouri, that in my opinion the laws of the State of Missouri, as discussed in the following Memorandum, provide adequate authority to carry out the program for the regulation of underground injection set forth in the "Program Description" submitted to the U.S. Environmental Protection Agency by the Missouri Department of Natural Resources. The specific authorities discussed are contained in statutes and regulations lawfully adopted and in force at the time of this statement.

Sincerely,

JOHN ASHCROFT  
Attorney General

MEMORANDUM OPINION

This memorandum opinion will be divided into two parts. The first part will relate to Missouri's Underground Injection Control Program governing Class II wells. The Class II part of the program is being submitted pursuant to § 1425 of the Safe Drinking Water Act, 42 U.S.C.A. § 300(f) et seq., and is subject to the requirements of § 1421(b)(1)(A) through (D) of the Act. The second part of the opinion will address the state's legal authority to carry out its UIC program in regard to Class I, III, IV, and V wells. This part of the program is being submitted under § 1422 of the Safe Drinking Water Act and is subject to the regulations contained in 40 CFR Parts 122, 123, 124, and 146.

Injection wells are classified in 40 CFR 146.05 as follows:

Class I

(1) Wells used by generators of hazardous wastes or owners or operators of hazardous waste management facilities to inject hazardous waste, other than Class IV wells.

(2) Other industrial and municipal disposal wells which inject fluids beneath the lowermost formation containing, within one quarter mile of the well bore, an underground source of drinking water.

Class II

Wells which inject fluids:

(1) Which are brought to the surface in connection with conventional oil or natural gas production;

(2) For enhanced recovery of oil or natural gas; and

(3) For storage of hydrocarbons which are liquid at standard temperature and pressure.

### Class III

Wells which inject for the extraction of minerals or energy, including:

(1) Mining of sulfur by the Frasch process;

(2) In situ production of uranium and other metals.

This category includes only in situ production from ore bodies which have not been conventionally mined. Solution mining of conventional mines such as stopes leaching is included in Class V;

(3) Solution mining of salts or potash;

(4) In situ combustion of fossil fuel; and

(5) Recovery of geothermal energy to produce electric power.

### Class IV

Wells used by generators of hazardous wastes or of radioactive wastes, by owners or operators of hazardous waste management facilities, or by owners or operators of radioactive waste disposal sites to dispose of hazardous wastes or radioactive wastes into or above a formation which within one quarter mile of the well contains an underground source of drinking water.

### Class V

Injection wells not included in Class I, II, III, or IV.

All statutory references in this memorandum are to the Revised Statutes of Missouri (RSMo 1978), unless otherwise indicated. All regulatory references are to the Code of State Regulations (CSR).

I. Class II Wells

A. Statutory and Regulatory Framework

Chapter 259, the Missouri Oil and Gas Production Law, was adopted in 1965 to regulate oil and gas production in Missouri and provides the basic authority for regulation of injection well activities. The statute created the "State Oil and Gas Council" to administer the provisions of the law. Section 259.070 describes the powers and duties of the Council. This section provides that the Council, acting through the office of the state geologist, has the authority:

(1) To require:

(a) Identification of ownership of oil or gas wells, producing leases, tanks, plants, structures, and facilities for the refining or intrastate transportation of oil and gas;

(b) The making and filing of all mechanical well logs and the filing of directional surveys if taken, and the filing of reports on well location, drilling and production, and the filing free of charge of samples and core chips and of complete cores less tested sections, when requested in the office of the state geologist within six months after the completion or abandonment of the well;

(c) The drilling, casing, operation, and plugging of wells in such manner as to prevent the escape of oil or gas out of one stratum into another; the intrusion of water into oil or gas stratum; the pollution of fresh water supplies by oil, gas, or highly

mineralized water; to prevent blowouts, cavings, seepages, and fires; and to prevent the escape of oil, gas, or water into workable coal or other mineral deposits;

(d) The furnishing of a reasonable bond with good and sufficient surety, conditioned upon the full compliance with the provisions of this chapter, and the rules and regulations of the council prescribed to govern the production of oil and gas on state and private lands within the state of Missouri;

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(i) That every person who produces, sells, purchases, acquires, stores, transports, refines, or processes native and indigenous Missouri produced crude oil or gas in this state complete and accurate records of the quantities thereof, which records shall be available for examination by the council or its agents at all reasonable times, and that every such person file with the council such reports as it may prescribe with respect to such oil or gas or the products thereof;

(2) To regulate pursuant to rules adopted by the council:

(a) The drilling, producing, and plugging of wells, and all other operations for the production of oil or gas;

(b) The shooting and chemical treatment of wells;

(c) The spacing of wells;

(d) Operations to increase ultimate recovery such as cycling of gas, the maintenance of pressure, and the introduction of gas, water, or other substances into producing formations; and

(e) Disposal of highly mineralized water and oil field wastes;

(3) To limit and to allocate the production of oil and gas from any field, pool, or area;

(4) To classify wells as oil or gas wells for purposes material to the interpretation or enforcement of this chapter;

(5) To promulgate and to enforce rules, regulations, and orders to effectuate the purposes and the intent of this chapter.

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Pursuant to its rule-making authority, the Council has adopted rules regulating the permitting, drilling, plugging, and spacing of oil and gas wells. More recently, the Council has established rules relating to the drilling and operation of injection wells. These rules were adopted by the Council on January 4, 1982, and became effective ten days after publication in the Missouri Register on February 1, 1982. All rules of the Oil and Gas Council are contained in 10 CSR 50, chapters 1-5.

#### B. Review Criteria

Under § 1425 of the Safe Drinking Water Act, a state may submit that part of its UIC program relating to Class II wells if it can demonstrate that a Class II well program meets the requirements of § 1421(b)(1)(A) through (D). The requirements under § 1421(b)(1) are that:

- (A) The state program prohibit any underground injection not authorized by permit;
- (B) The state program requires a permit applicant to show that underground injection will not endanger drinking water sources;
- (C) The state program includes inspection, monitoring, recordkeeping, and reporting requirements; and

(D) The state program applies to federal agencies and to persons on property owned or leased by the United States.

In addition to these four requirements, the state must also show that its program represents an effective program to prevent underground injection which endangers drinking water sources. These five criteria will each be discussed separately.

1. Prohibition of Unauthorized Injection (SDWA § 1421(b)(1)(A))

The state prohibits any unauthorized Class II underground injection by requiring that a permit be obtained for all wells drilled for oil or gas production, or wells used for fluid injection or waste disposal.

Citation of Laws and Regulations

Section 259.070

Section 259.080

Section 250.200

Section 259.210

10 CSR 50-2.010

10 CSR 50-2.020

10 CSR 50-2.030

10 CSR 50-2.090

Explanation of Authority

Section 259.080 provides that it shall be unlawful to drill or deepen any well for oil or gas without first obtaining a permit from the state geologist under such regulations as may be prescribed by the Missouri Oil and Gas Council. Under § 259.070, the Oil and Gas Council has the authority to require the drilling, casing, operation, and plugging of wells in such

manner as to prevent the pollution of fresh water supplies by oil, gas, or highly mineralized water. It also has the authority to regulate pursuant to rules adopted by the council the drilling, producing, plugging and all other operations for the production of oil and gas; operations to increase recovery by the introduction of gas, water, or other substances into producing formations; and the disposal of highly mineralized water and oil field waste.

Pursuant to the authority granted it by §§ 259.070 and 259.080, the Oil and Gas Council has adopted regulations which require that all wells related to oil or gas production, be they primary recovery, injection, or waste disposal wells, be permitted. Oil and Gas Council regulation 10 CSR 50-2.030 requires that prior to the commencement of operations, an application for permit must be made with the state geologist. To obtain a permit for a Class II injection well, the applicant must submit Form OGC-3I. An organization report and a bond must also be filed prior to the commencement of operations (10 CSR 50-2.010, 10 CSR 50-2.020). In addition, 10 CSR 50-2.090 provides that prior to the disposal of fluid by injection, a permit application must be submitted and approved by the state geologist. Together with Form OGC-3I (application for permit), the applicant must also submit a location plat (Form OGC-4I), a schematic drawing of the well (Form OGC-11), and any other pertinent data concerning the details of the proposed operation which may be required by the state geologist.

The state program also provides an appropriate formal mechanism for modifying permits in cases where the operation has undergone a significant change. Regulation 10 CSR 50-2.030(14) provides that prior to any substantial change in the method of operation of any well, the operator of such well shall submit a revised application form to the state geologist. The state geologist shall have at least 15 days to review the revised application, and to either approve or deny the proposed modification. No substantial change in the operation of a well may be commenced until it has been approved in writing by the state geologist.

Under these regulations, it is clear that a permit must be obtained for all Class II injection wells and that no substantial change may take place in the operations of a permitted Class II well unless such change has been approved in writing by the state geologist. Section 259.080 provides that it shall be unlawful to commence operations for the drilling of any well for oil or gas without first obtaining a permit from the state geologist under the rules and regulations prescribed by the Oil and Gas Council. Violations of § 259.080, and the rules and regulations of the Oil and Gas Council, are subject to the penalties provided in § 259.200. Section 259.200 provides that such violations are subject to a penalty of up to \$1,000 for each violation and for each day that such violation continues. The Attorney General is authorized to file suit in the name and on behalf of the Oil and Gas Council to recover such penalties. Section 259.210 authorizes

suit for injunctive relief to restrain any person who is violating or threatening to violate any provision of Chapter 259, or any rule, regulation or order of the Oil and Gas Council. Injection wells drilled or operated without a permit would be subject to a penalty of up to \$1,000 per day under § 259.200. The operation of an unpermitted injection well would be enjoined pursuant to § 259.210.

2. Permit applicant to show that underground injection will not endanger drinking water sources. (SDWA § 1421(b)(1)(B))

The state requires a permit applicant to show that the proposed injection will not endanger drinking water sources by requiring the applicant to provide detailed information concerning the nature of the injection project, the injection interval, and any underground sources of drinking water which may be affected. Based upon this information, the state geologist may grant the permit or deny it if he feels that an underground source of drinking water will be endangered.

Citation of Laws and Regulations

10 CSR 50-2.030

10 CSR 50-2.040

10 CSR 50-2.090

Explanation of Authority

A permit applicant is required to submit to the state geologist sufficient information to allow the state geologist to make a knowledgeable decision to grant or deny the permit. Regulation 10 CSR 50-2.030 provides that a permit applicant

for an injection well shall file Form OGC-3I with the state geologist. On Form OGC-3I, the applicant must provide detailed information concerning the nature and operation of the proposed injection project. Data to be provided on Form OGC-3I includes:

- a. Well location and lease description, including the size of the lease and the distances from the proposed well to other wells on the lease and to the lease lines;
- b. An outline of the proposed stimulation program;
- c. Proposed casing to be used, including amount, size, weight per foot, and cement;
- d. Average and maximum daily injection, including rate, pressure, and volume of injection;
- e. Estimated fracture pressure/gradient of injection zone;
- f. Source and analysis of injection fluid;
- g. Description of the compatibility of the injection fluid with the receiving formation;
- h. Descriptions of the injection and confining zones, including lithographic description, geologic name, thickness, depth, porosity, and permeability;
- i. All available logging and testing data on the well;
- j. Detailed description of any well needing corrective action which penetrates the injection zone in the area of review, including the reason for and proposed corrective action.

Regulation 10 CSR 50-2.030(3) provides that an accurate location plat (Form OGC-4I) shall accompany the application.

Such a plat shall show the area of review for the applicant well and all area of review wells of public record that penetrate the injection interval. Descriptions of all area of review wells shall be provided and shall include the lease name, well number, location, owner, depth, type, date spudded, date completed, and the construction.

Regulation 10 CSR 50-2.030(4) requires that a schematic diagram (Form OGC-11) of the injection well be submitted prior to approval of the application. The schematic diagram shall include:

- a. Configuration of the well head;
- b. Total depth and/or plug-back total depth;
- c. Depth of all injection or disposal intervals and their formation names;
- d. Lithography of all formations penetrated;
- e. Depths of the tops and bottoms of all casing and tubing;
- f. Type and depth of packer;
- g. Depth, location, and type of all cement;
- h. Depth of all perforations and squeeze jobs;
- i. Geologic name and depth to bottom of all underground sources of drinking water which may be affected by the injection.

Based upon the information provided in Forms OGC-3I, OGC-4I, and OGC-11, the state geologist makes a determination to issue or deny the permit for an injection well. In addition to the permit requirements, all new or newly converted injection wells

are required to demonstrate mechanical integrity for the absence of significant leaks and the absence of significant fluid movement in vertical channels prior to the commencement of operations under Regulation 10 CSR 50-2.040. All logs and test data are to be sent to the state geologist prior to the commencement of operations. Under 10 CSR 50-2.040(7), the state geologist will establish maximum injection pressure for the well to insure that fractures are not created or enlarged and that injected fluid will not migrate into an underground source of drinking water. Regulation 10 CSR 50-2.090 also provides that before any produced fluids may be disposed of by injection, Forms OGC-3I, OGC-4I, and OGC-11, and any other information required must be submitted to and approved by the state geologist prior to any injection.

By requiring the permit applicant to provide detailed information concerning the geology of the proposed injection and the nature of the proposed injection project, the state program places the burden on the permit applicant to show that the proposed injection will not endanger underground drinking water sources.

3. Inspection, Monitoring, Recordkeeping, and Reporting  
(SDWA § 142(b)(1)(c))

State statutes and regulations provide for inspection, monitoring, recordkeeping, and reporting of injection well operations.

Citation of Laws and Regulations

Section 259.070

10 CSR 50-2.040

10 CSR 50-2.050

10 CSR 50-2.080

10 CSR 50-2.100

Explanation of Authority

Section 259.070 delegates to the Oil and Gas Council "the duty and the authority to make such investigations as it deems proper to determine whether waste exists or is imminent or whether other facts exist which justify action." Section 259.070 (1)(b) further authorizes the Council to require the making and filing of mechanical well logs, directional surveys, reports on well location, drilling, and production, and the filing of samples and core chips if requested by the state geologist. Section 259.070(2) authorizes the Council to regulate by rule:

(a) the drilling, producing, and plugging of wells, and all other operations for the production of oil or gas;

(b) the shooting and chemical treatment of wells;

(c) the spacing of wells;

(d) operations to increase ultimate recovery such as cycling of gas, the maintenance of pressure, and the introduction of gas, water, or other substances into producing formations; and

(e) disposal of highly mineralized water and oil field wastes.

Finally, under § 259.070(5), the Council is authorized to promulgate and enforce rules, regulations, and orders to effectuate the purposes and the intent of Chapter 259. We construe these provisions to empower the Council to inspect and monitor injection wells, to require that accurate records concerning

injection well activities be maintained and filed with the Council, and to adopt rules and regulations to accomplish these ends.

The regulations contained in 10 CSR 50-2.040, 2.050, 2.080, and 2.100 flesh out the inspection and reporting requirements of the state program. Regulation 10 CSR 50-2.040(11) provides that the state geologist or an authorized representative shall have the authority to sample injected fluids at any time during an injection operation. Regulation 10 CSR 50-2.080(2) states that an operator shall file monthly reports of injected fluids, describing the method of disposal of all water produced from oil or gas wells and enhanced recovery operations. Regulation 10 CSR 50-2.100(3) also requires that monthly reports be submitted for fluid injection projects. The operator is required to monitor the injection pressure and rate on each injection well on at least a monthly basis with the results reported annually to the state geologist under 10 CSR 50-2.080(6). All monitoring reports will be retained for at least five years by the state geologist (10 CSR 50-2.080(7)). The requirement that an operator provide prompt notice of mechanical failure is addressed in both 10 CSR 50-2.080(5) and 10 CSR 50-2.040(10). Regulation 10 CSR 50-2.080(5) provides that an operator shall notify the state geologist of any mechanical failure of an injection well or of any other condition which threatens to contaminate an aquifer. Regulation 10 CSR 50-2.040(10) requires an operator to inform the state geologist of any well which cannot demonstrate mechanical integrity and to

cease operation of the well. If corrective action cannot restore mechanical integrity within 30 days, the operator must again inform the state geologist, who may grant an additional 30 days to restore mechanical integrity before ordering the well plugged.

We conclude that the state has an adequate program to carry out an effective system of inspection, monitoring, reporting, and recordkeeping.

4. Authority to Regulate Federal Agencies and Persons on Property Owned or Leased by the United States (SDWA § 1421(b)(1)(D))

State statutes provide authority to regulate injection well activities by federal agencies and by persons on property owned or leased by the United States.

Citation of Laws and Regulations

Section 1.020

Section 259.050

Section 259.070

Section 259.090

Section 259.200

Section 259.210

Explanation of Authority

Chapter 259 does not specifically address the question of its applicability to federal agencies and facilities, but it is the opinion of this office that the provisions of Chapter 259 govern Class II injection well activities by federal agencies and on federal lands.

Section 259.080, which states that it shall be unlawful to commence oil or gas drilling operations without a permit, does

not specify who it is that must obtain a permit. However, §§ 259.200 and 259.210, the sections relating to injunctive relief and penalties, both provide that action may be taken against any person who violates the provisions of Chapter 259, or the rules, regulations, or orders of the Oil and Gas Council. "Person" is not defined in Chapter 259. Section 1.020 does provide a definition. It states:

1. As used in the statutory laws of the state, unless otherwise specially provided or unless plainly repugnant to the intent of the legislature or to the context thereof:

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(7) The word "person" may extend and be applied to bodies politic and corporate, and to partnerships and other unincorporated associations.

The term "body politic" has not been further defined by Missouri law or statute. However, this term has generally been construed to include the United States and agencies of the federal government (See Body, 11 C.J.S. 380; United States v. Maurice, 26 Fed. Cas. 1211, 1216, No. 15, 747 (C.J. Marshall): "The United States is a government, and, consequently, a body politic and corporate.")). Thus, we construe "bodies politic" to include federal agencies, and conclude that "person" as defined in § 1.020 and as used in Chapter 259 includes agencies of the federal government.

Other language in Chapter 259 indicates that its provisions apply to all oil or gas operations within the state, regardless of ownership or location. Section 259.070(3) provides that the

Oil and Gas Council has the authority "to limit and allocate the production of oil and gas from any field, pool, or area." In the definition contained in § 259.050, "illegal gas" it is defined as gas which has been produced from any well within the state in excess of the quantity permitted. . . ." "Illegal oil" is defined in the same fashion as excess oil produced from any well within the state. Section 259.090, concerning the regulation of production, contains similar language. Paragraph 3 provides:

Whenever the council limits the total amount of oil or gas which may be produced in any pool in this state. . . . (emphasis ours)

We construe these provisions to include all oil or gas production within the state, regardless of ownership or location.

One exception to the general application of the Oil and Gas Law to federal agencies and facilities may exist. Section 259.070 (1)(d) provides that:

The council acting through the office of the state geologist has the authority

(1) To require:

(D) The furnishing of a reasonable bond with good and sufficient surety, conditioned upon the full compliance with the provisions of this chapter, and the rules and regulations of the council prescribed to govern the production of oil and gas on state and private lands within the state of Missouri.

This provision may preclude the council from requiring a bond to be furnished for wells drilled or operated on federal lands. However, because this exclusionary language occurs nowhere else in

Chapter 259, we conclude that all other provisions of the statute and the rules and regulations of the council with the exception of those relating to bonds, do apply to injection well activities conducted on federal lands.

We also note that § 1447 of the Safe Drinking Water Act provides that federal agencies engaged in underground injection which could endanger drinking water sources shall be subject to and shall comply with all state requirements, both procedural and substantive, in the same manner as any non-governmental entity. This section, together with Chapter 259, gives the state sufficient authority to administer its Class II program as to federal facilities and persons on property owned or leased by the United States.

5. Effective Program to Prevent Injection Which Endangers Drinking Water Sources (SDWA § 1425)

The state program represents an effective program to prevent underground injection which endangers drinking water sources by demonstrating (1) an effective permitting process which results in enforceable permits; (2) the application of technical requirements to operators by permit or rule, (3) an effective compliance program to determine compliance with permit requirements, (4) an effective means of enforcement against violators, and (5) adequate participation by the public in the permit issuance process.

A. Effective Permitting Process

State statutes and regulations provide for an effective permitting process which results in enforceable permits by

requiring that detailed information concerning the proposed injection project be submitted prior to the issuance of a permit and by the imposition of civil penalties and injunctive relief for violations of permit conditions or the rules and regulations of the Oil and Gas Council.

#### Citation of Laws and Regulations

Section 259.080

Section 259.200

Section 259.210

10 CSR 50-2.010

10 CSR 50-2.020

10 CSR 50-2.030

10 CSR 50-2.040

#### Explanation of Authority

The state regulations provide for an effective permitting process which results in enforceable permits. Under § 259.080 and 10 CSR 50-2.030, a permit must be obtained for an injection well prior to the commencement of operations (See § I. 1., supra). A permit applicant must complete and submit a permit application (Form OGC-3I) which details the nature and operation of the proposed injection project (10 CSR 50-2.030). Regulation 10 CSR 50-2.030(1) provides that an organization report (Form OGC-1) and bond (Form OGC-2) must be on file with the state geologist or must accompany the permit application. The organization report must state the name and address of the company, organ-

ization, or individual which will carry on the oil or gas production activities. This form also requires the names and addresses of the directors and the registered agent (in the case of a corporation), or the names and addresses of all partners (in the case of a partnership). It must be signed before a notary by one authorized to act on behalf of the organization. Any change as to the facts in the organization report must be reported to the state geologist within 30 days after the change. A change of ownership of any wells of the organization shall be reported to the state geologist within 10 days of the change (10 CSR 50-2.010 (3)).

A permit applicant must also file with the state geologist a good and sufficient bond for each well or hole (10 CSR 50-2.020). No drilling or operation may commence or continue unless there is an approved bond on file with the state geologist (10 CSR 50-2.020(2)). Other components of a permit application are a location plat (Form OGC-4I) and a schematic diagram of the well (Form OGC-11).

Upon application for a permit, the state geologist shall review the application and within 15 days, determine whether the application is in proper form and whether the application meets the requirements of Chapter 259 and the rules and regulations of the Oil and Gas Council (10 CSR 50-2.030(9)). If the state geologist determines that the drilling of the well poses an undue risk to the surface or subsurface environment or that the operator has previously drilled wells that have been

abandoned and not plugged in the proper manner, he shall deny the permit (10 CSR 50-2.030(9)).

In addition to the permit requirements applicable to all wells, new or newly converted injection wells are required to demonstrate mechanical integrity prior to the commencement of operations (10 CSR 50-2.040(6)). All injection wells must demonstrate mechanical integrity every 5 years to continue operations. If a well cannot demonstrate mechanical integrity, and corrective action cannot restore mechanical integrity, then the state geologist shall order the well plugged (10 CSR 50-2.040(10)).

Permits are not transferrable (10 CSR 50-2.030(11)). Permits may be revoked by the council after hearing, if it determines that any provision of Chapter 259, or the rules and regulations of the council or the conditions of the permit have been violated, or that any fraud, deceit, or misrepresentation was made to obtain the permit (10 CSR 50-2.030(10)). Modifications in a permitted injection project require the submission of a revised application to and approval by the office of the state geologist (10 CSR 50-2.030(14)).

Violations of the rules, regulations, or orders of the council are actionable under §§ 259.200 and 259.210. Violations are subject to a penalty of \$1,000 per day for each violation and for each day that the violation continues. Section 259.210 authorizes the Attorney General to seek injunctive relief to restrain any person who is violating or threatening to violate

any provision of Chapter 259 or the rules, regulations, or orders of the Oil and Gas Council. Section 259.200.2 makes it a misdemeanor to knowingly make any false entry or statement in any report, record, account or memorandum required to be submitted by Chapter 259 or the rules, regulations, or orders of the Oil and Gas Council.

We conclude that the state regulations authorize and provide for an effective permitting process which results in enforceable permits.

B. Minimum Technical Criteria

The state has the authority to apply by permit or rule technical requirements designed to prevent the migration of injected fluids into drinking water sources.

Citation of Laws and Regulations

10 CSR 50-1.030

10 CSR 50-2.030

10 CSR 50-2.040

10 CSR 50-2.060

Explanation of Authority

1. Siting Requirements

The permit applicant is required to submit an accurate schematic diagram of the proposed injection well by 10 CSR 50-2.030 (4). This diagram must include a description of the lithography of all formations penetrated, the depth of all injection intervals and their formation names, and the geologic name and depth to bottom of all underground sources of drinking water which

may be affected by the injection. This information, together with other data supplied in the permit application (Form OGC-3I) and the location plat (Form OGC-4I) will allow the state geologist to determine if the proposed disposal zones are hydraulically isolated from drinking water sources. If the disposal zones are not isolated, then the state geologist may deny the permit as an undue risk to subsurface environment (10 CSR 50-2.030(9)).

## 2. Construction

Regulation 10 CSR 50-2.040(2) provides that all injection wells are required to be properly cased and cemented to prevent the movement of fluids into sources of drinking water. These specific casing and cementing requirements are based on the nature of the injected fluids and the hydraulic relationship between the injection zone and the underground source of drinking water. Under 10 CSR 50-2.040(6), all new or newly converted injection wells must demonstrate mechanical integrity prior to the commencement of operations.

## 3. Operation

Regulation 10 CSR 50-2.040(7) requires the state geologist to establish a maximum injection pressure for injection wells so that the pressure in the injection zone does not initiate new fractures or propagate existing fractures in the confining zone, or cause the injected fluid to migrate into underground sources of drinking water. Regulations 10 CSR 50-2.040(11) and (12) authorize the state geologist to sample injected fluids

and to monitor injection pressure. If a well cannot demonstrate mechanical integrity, then the operator must cease operations and notify the state geologist under 10 CSR 50-2.040(10). If mechanical integrity is not established within 30 days, the operator must again notify the state geologist, who may grant the operator an additional 30 days to take corrective action before ordering the well plugged.

#### 4. Plugging and Abandonment

The state regulations require the proper plugging of wells upon abandonment. Regulation 10 CSR 50-2.060(1) provides that before beginning abandonment work, an operator must file with the state geologist a notice of intention to abandon (Form OGC-6). This form requires the operator to outline the proposed plugging procedures. Regulation 10 CSR 50-2.060(3) provides that before any well is abandoned, it shall be plugged in a manner which will permanently confine all oil, gas, and water in the strata originally containing them. Regulation 10 CSR 50-2.060(5) requires that appropriate means be taken to eliminate the movement of surface water into a plugged well and to prevent the pollution of subsurface strata. Upon the completion of plugging, Regulation 10 CSR 50-2.060(7) requires that the plugging record (Form OGC-7) be submitted to the state geologist. This form includes information on the character and depth of the well, the formations penetrated by the well, as well as a description of the plugging procedures followed and the size and kind of plugging materials used.

## 5. Area of Review

The state program incorporates the concept of an area of review. "Area of review" is defined in 10 CSR 50-1.030(1)(B) as "an area surrounding a single applicant well or extending from the outer perimeter of a group of applicant wells to a minimum of 1/2 mile from said well or wells and including the project area of said well or wells." The permit applicant is required to identify the area of review for an applicant injection well and to identify and describe all wells of public record in the area of review (10 CSR 50-2.030(3)).

## 6. Corrective Action

The state program includes the authority to require the operator to take corrective action on wells within the area of review. Regulation 10 CSR 50-2.040(6) requires that all new or newly converted injection wells demonstrate mechanical integrity prior to commencement of operations. Regulation 10 CSR 50-2.040 (9) provides that existing injection wells must demonstrate mechanical integrity within 5 years after the state's UIC program is initiated. All injection wells must demonstrate mechanical integrity every 5 years.

Regulation 10 CSR 50-2.040(10) provides that if a well cannot demonstrate mechanical integrity, the operator must cease operations and inform the state geologist. If corrective action cannot restore mechanical integrity within 30 days, the operator must again inform the state geologist. The state geologist may grant the operator an additional 30 days to take corrective action before ordering the well to be plugged.

## 7. Mechanical Integrity

The state program requires the demonstration of mechanical integrity of new injection wells prior to operations and of all wells at least once every 5 years (10 CSR 50-2.040(6), (9)).

Under 10 CSR 50-1.030(1)(N), mechanical integrity exists if there is no significant leakage in the casing, tubing, or packer and there is no significant fluid movement into an underground source of drinking water through vertical channels adjacent to the well bore. Regulation 10 CSR 50-2.040(6) prescribes the methods by which mechanical integrity can be demonstrated.

The absence of significant leaks may be shown by:

1. A pressure test with liquid or gas;
2. Monitoring of annulus pressure in wells injecting at a positive pressure following an initial pressure test; or
3. Any other test or combination of tests that the state geologist considers effective.

The absence of significant fluid movement in vertical channels adjacent to the well bore may be demonstrated by using at least two of the following procedures:

1. Cementing records;
2. Tracer surveys;
3. Noise logs;
4. Temperature surveys; or
5. Any other test or combination of tests that the state geologist considers effective.

We conclude that the state has the authority to apply technical requirements designed to prevent the migration of injection or formation fluids into underground sources of drinking water.

C. Surveillance

The authority to conduct an effective surveillance program has previously been discussed in § I. 3. (Inspection, Monitoring, Recordkeeping, and Reporting).

D. Enforcement

The state has the authority to conduct an effective enforcement program against violators.

Citation of Laws and Regulations

Section 259.200

Section 259.210

Section 557.021

Section 558.011

Section 560.016

Section 560.021

Explanation of Authority

Section 259.200 provides that civil penalties may be sought against any person who violates any provision of Chapter 259, or any rule, regulation, or order of the Oil and Gas Council, in the amount of not more than \$1,000 for each act of violation and for each day that such violation continues. Section 259.200.3 provides that any person who knowingly aids or abets any other person in

the violation of any provision of Chapter 259, or the rules, regulations, or orders of the Oil and Gas Council shall be subject to the same penalty as that prescribed by Chapter 259 for the violation by such other person.

Section 259.200.2 makes it a misdemeanor to falsify, omit or destroy any report, record, memorandum, or account required by Chapter 259 or the rules, regulations, or orders of the Oil and Gas Council. Section 557.021 provides that when an offense is declared to be a misdemeanor, but no penalty is specified, then the offense is a Class A misdemeanor. The punishment for a Class A misdemeanor is a term of imprisonment of up to one year (§ 558.011) and/or a fine of up to \$1,000 if the offender is a person and up to \$5,000 if the offender is a corporation (§§ 560.016, 560.021).

Section 259.210 provides that injunctive relief may be sought to restrain any person who is violating or threatening to violate any provision of Chapter 259 or the rules, regulations, or orders of the Oil and Gas Council. In any such action, the Circuit Court shall have the jurisdiction to grant such prohibitory or mandatory injunctions as the facts may warrant, including temporary restraining orders, preliminary injunctions, and temporary, preliminary or final orders restraining the movement or disposition of any illegal oil, gas, or product.

E. Public Participation in the Permitting Process

State regulations provide for adequate public participation in the permitting process.

### Citation of Laws and Regulations

10 CSR 50-2.030

#### Explanation of Authority

Regulation 10 CSR 50-2.030(5) provides that a permit applicant shall publish a notice of application in a newspaper of general circulation in the county in which the injection well will be located and shall submit a copy of this notice to the state geologist. The notice shall include the name and address of the applicant, the location of the proposed well, the geologic name and depth of the injection zone, a description of the need for the injection well, and the address of the state geologist where additional information may be obtained. A 15 day written comment period shall follow the publication of the notice. If the state geologist determines that a significant degree of public interest is expressed, he may order a public hearing. Public notice of the hearing will be made at least 30 days prior to the hearing.

#### II. Class I, III, IV, and V Wells

##### A. Class I Wells

State law prohibits the construction and use of all Class I injection wells used for the disposal of hazardous, industrial or municipal waste.

### Citation of Laws and Regulations

Section 577.155, RSMo Supp. 1981

### Explanation of Authority

Section 577.155.1 prohibits the construction and use of any waste disposal well located in the state. Section 577.155.2 defines "waste disposal well" as "any subsurface void porous formation or cavity, natural or artificial, used for disposal of liquid or semiaqueous waste except as excluded in subsection 3 of this section." Injection wells are defined by federal regulation as wells into which "fluids" are injected (40 CFR 146.03). Class I wells are fluid injection wells used to inject hazardous, industrial, or municipal waste beneath the lower-most formation containing an underground source of drinking water within one quarter mile of the well bore. Because Class I wells are not within any of the exceptions in § 577.155.3, we conclude that the construction or use of any Class I injection well is prohibited by § 577.155. Subsection 5 of § 577.155 provides that any violation of the provisions of § 577.155 is a misdemeanor with each day constituting a separate offense.

We note that the state provisions banning all Class I injection wells are more stringent than the federal requirements under 40 CFR 146, Subpart B, which do allow Class I injection wells when authorized by permit.

#### B. Class III Wells

There are currently no Class III injection wells in this state and such injections could not lawfully occur without a permit subject to effluent regulations and water quality standards for subsurface waters.

### Citation of Laws and Regulations

Section 204.016

Section 204.051

10 CSR 20-6.010

10 CSR 20-7.015

10 CSR 20-7.031

### Explanation of Authority

If a state can demonstrate that there are no underground injections within the state for a class of injection wells subject to the Safe Drinking Water Act and that such injections cannot legally occur until the state has developed an approved program for that class of injection, 40 CFR § 123.51(d) provides that the state need not submit a program to regulate that class of injection. At the present time, based upon the knowledge of the Department of Natural Resources, there are no Class III injection wells in the state of Missouri (See Program Description). Existing Missouri law does not completely prohibit Class III injections. Nevertheless, it is our belief that under present Missouri law, the discharge of water contaminants from Class III injection wells could not lawfully occur unless the discharger had obtained a permit from the Missouri Clean Water Commission subject to the regulations contained in 10 CSR 20-6 and 10 CSR 20-7, and that these regulations effectively prohibit any Class III injection which might endanger underground sources of drinking water.

Section 204.051.2 of the Missouri Clean Water law provides in part:

2. It shall be unlawful for any person to build, erect, alter, replace, operate, use or maintain any water contaminant or point source in this state that is subject to standards, rules or regulations promulgated pursuant to the provisions of sections 204.006 to 204.141 unless he holds a permit from the commission, subject to such exceptions as the commission may prescribe by rule or regulation. . . .

"Water contaminant source" is defined in § 204.016(13) as:

[T]he point or points of discharge from a single tract of property on which is located any installation, operation or condition which includes any point source defined in sections 204.006 to 204.141 and nonpoint source under any federal water pollution control act, which causes or permits a water contaminant therefrom to enter waters of the state either directly or indirectly;

"Point source", as defined in § 204.016(6), "means any discernable, confined, and discrete conveyance, including but not limited to any . . . , well, . . . from which pollutants are or may be discharged." Finally, "waters of the state" is defined in § 204.016(15) as "all rivers, streams, lakes, and other bodies of surface or subsurface water. . . ."

Reading these provisions together we conclude that it is unlawful under § 204.051.2 to build, erect, alter, replace, operate, use, or maintain any well which discharges or may discharge pollutants into subsurface waters and which is subject to standards, rules or regulations of the Clean Water Commission, unless a permit to do so has been obtained from the Commission. We also believe that a Class III injection well is a point source that is subject to standards, rules and regulations, and that construction or operation of a Class III injection well would require a permit from the Commission.

Regulation 10 CSR 20-6.010(1)(A) describes who must apply for a permit:

(A) All persons who build, erect, alter replace, operate, use, or maintain existing or proposed point sources, water contaminant sources or wastewater treatment facilities shall apply to the department for the permits required by the Missouri Clean Water Law and these regulations. The department shall issue these permits in order to enforce the Missouri Clean Water Law and regulations and administer the NPDES program.

Regulation 10 CSR 20-6.010(1)(B) identifies sources which are exempt from the permit requirement:

(B) The following are exempt from permit regulations:

1. Nonpoint source discharges;
2. Service connections to sewer systems;
3. Internal plumbing and piping or other water diversion or retention structures within a manufacturing or industrial plant or mine, which are an integral part of the industrial or manufacturing process or building, or mining operation. An operating permit or general permit shall be required, if such piping, plumbing, or structures result in a discharge to waters of the state;
4. Routine maintenance or repairs of any existing sewer system, wastewater treatment facility, or other water contaminant or point source;
5. Single family residences; and
6. Separate storm sewers are subject only to the general permit requirements.

Reading these two provisions together, we conclude that all water contaminant sources, point sources and wastewater treat-

ment facilities which are not specifically exempted in subparagraph (B) are required to be permitted. Because Class III injection wells are point sources and do not fall within any of the six exemptions in subparagraph (B), a permit must be obtained for the construction or operation of a Class III injection well.

The regulations in 10 CSR 20-7 describe the water quality standards and effluent regulations for the waters of the state. The effluent regulations for subsurface water are contained in 10 CSR 20-7.015(2):

(2) Subsurface Waters

(A) No person shall release any wastewater into aquifers, or store or dispose of such wastewater in a way which causes or permits it to enter aquifers either directly or indirectly unless it meets the requirement set out in Appendix II of this rule.\*

(B) No wastewater shall be introduced into sinkholes, caves, fissures, or other openings in the ground which do or are reasonably certain to drain into aquifers except as provided in paragraph (3)(B)3. of this rule.\*\*

Water quality standards for ground water are contained in 10 CSR 20-7.031. General water quality criteria are described in 10 CSR 20-7.031(3):

(3) General Criteria: The following water quality criteria shall be applicable to all waters of the state at all times. No water contaminant, by itself or in combination with other substances, shall prevent the waters of the state from being--

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\* Appendix II is reprinted in Table I.

\*\* 10 CSR 20-7.015(3)(B)3 is reprinted in Table II.

(A) free from substances in sufficient amounts to cause the formation of putrescent, unsightly or harmful bottom deposits, or interfere with beneficial uses;

(B) free from oil, scum, and floating debris in sufficient amounts to be unsightly or interfere with beneficial uses;

(C) free from substances in sufficient amounts to cause unsightly color or turbidity, offensive odor or taste, or interfere with beneficial uses; and

(D) free from substances or conditions that have a harmful effect on human, animal, or aquatic life.

"Beneficial uses", as mentioned in 10 CSR 20-7.031(3)(A), (B), and (C), includes drinking water supplies (See definitions, 10 CSR 20-7.031(1)(B)6). Thus, any release of a water contaminant so as to interfere with the use of subsurface water as a drinking water source is proscribed by 10 CSR 20-7.031(3). More specific water quality standards for subsurface waters are prescribed in 10 CSR 20-7.031(5).\*\*\*

Based upon these regulations, the Clean Water Commission has the authority to require the permitting of Class III injection wells if and when such activities appear in the State of Missouri. The present statutory and regulatory restrictions do not act as a complete ban on all Class III injections, however, the effluent regulations and the water quality standards do allow the Commission to impose stringent conditions on any permit which might be issued so as to insure the integrity of underground sources of drinking water. We conclude that there are presently no Class

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\*\*\* 10 CSR 20-7.031(5) is reprinted in Table III.

III injection wells in Missouri and that such injections could not lawfully occur without a permit from the Clean Water Commission, subject to the effluent regulations and water quality standards contained in 10 CSR 20-7.

TABLE I

Appendix II--Aquifer water recharge:

This section shall apply to percolating water from all areas of land on which wastes or wastewater is applied or allowed to accumulate. Such percolating water shall be considered an effluent to aquifers and subject to the following requirements when it reaches a depth at which additional attenuation of pollutants is not expected before entering an aquifer. This depth shall be established by the department using best engineering judgement. Monitoring of percolating water may be required at varying depths to determine the rate and direction of flow and pollutant concentration.

(Values are in micrograms per liter unless noted otherwise.)

(ug/l). (All metals are dissolved metals unless noted otherwise.)

Selenium	10 ug/l
Zinc	100 ug/l
COD	10 mg/l
Threshold Odor Number (TON)	3
Linear Alkylate Sulfonates	1.0 mg/l
Chlorides	250 mg/l
Sulfates	250 mg/l
Total dissolved solids	500 mg/l
Nitrate as (N)	10 mg/l
Arsenic	50 ug/l
Barium	1,000 ug/l
Beryllium	100 ug/l
Boron	750 ug/l
Cadmium	10 ug/l
Chromium (Total)	50 ug/l
Cobalt	1,000 ug/l
Copper	20 ug/l
Chloride	10 ug/l
Cyanide	5 ug/l
Fluoride	2,000 ug/l
Lead	50 ug/l
Manganese	50 ug/l
Mercury	0.05 ug/l
Nickel	100 ug/l
Phenols	1 ug/l
pH	6.0-9.0

TABLE II

3. Discharges to losing streams shall not be permitted unless an engineer shows the department that effluent removal is not technically feasible as determined by best available technology, as defined in 301(b) of the Federal Clean Water Act; and that the discharge will not cause the losing stream to exceed the limitations in Appendix II at the point where the losing stream enters an aquifer. If the department agrees to allow a release to a losing stream, its limits shall be--

A. BOD<sub>5</sub> equal to or less than a monthly average of ten (10) mg/l and a weekly average of fifteen (15) mg/l;

B. Suspended Solids equal to or less than a monthly average of fifteen (15) mg/l and a weekly average of twenty (20) mg/l; and

C. pH at 6.0-9.0.

TABLE III

(5) Ground water: Water contaminants shall not cause the following concentrations to be exceeded in waters in aquifers and caves: (All metals are dissolved metals unless otherwise noted).

Arsenic	50 ug/l
Barium	1000 ug/l
Beryllium	100 ug/l
Boron	750 ug/l
Chromium (Total)	50 ug/l
Cobalt	1000 ug/l
Cadmium	1.2 ug/l
for ground water contributing to cold-water streams,	
Cadmium	10 ug/l
for other streams	
Chlorine	10 ug/l
Copper	20 ug/l
Cyanide	5 ug/l
Manganese	50 ug/l
Nickel	100 ug/l
Selenium	10 ug/l
Phenol	1 ug/l
Mercury	.05 ug/l
Zinc	100 ug/l
Lead	50 ug/l
Nitrate-Nitrogen	10 mg/l
	(10,000 ug/l)
Fluoride	2 mg/l
	(2,000 ug/l)
pH	6.5-9.0

Where natural concentrations for any constituent are higher than these limits, the concentration may not be increased. Pesticide limits for ground water shall be the same as for surface waters. Ground water concentration of dissolved solids, chloride, sulfate, and iron are variable; any additions of these to ground water shall be such that beneficial uses are not impaired.

### C. Class IV Wells

State law prohibits the construction and use of all Class IV injection wells used for the disposal of hazardous or radioactive waste.

#### Citation of Laws and Regulations

Section 577.155, RSMo Supp. 1981

#### Explanation of Authority

Section 577.155 prohibits the construction and use of all waste disposal wells not specifically exempted in subsection 3 of § 577.155. Class IV injection wells (wells used to dispose of hazardous or radioactive waste into or above a formation which contains an underground source of drinking water within one quarter of a mile) are waste disposal wells and do not fall within any of the exempted categories. Therefore, we conclude that Class IV injection wells are prohibited in the state (see also, II.A. Class I wells, supra).

### D. Class V Wells

State law requires the permitting of ground water heat pump injection/withdrawal wells that serve nine or more single family residences or that serve more than one single family residence if the combined injection/withdrawal rate is 600,000 BTU/hour or greater.

#### Citation of Laws and Regulations

Section 204.026

Section 204.051

Section 204.056

Section 204.076

Section 577.155, RSMo Supp. 1981

10 CSR 20-2.010

10 CSR 20-6.070

Explanation of Authority

Class V includes a large class of wells not included in the other categories and regulation of these wells is accomplished by two different statutes depending upon the type of well. Wells in Class V which may be categorized as waste disposal wells are prohibited by § 577.155 (see Parts II.A. Class I Wells and II.D. Class IV Wells, supra). Wells which discharge contaminants to subsurface waters, but which are not waste disposal wells, are subject to the provisions of the Missouri Clean Water Law, Chapter 204. These wells would require a permit for construction and operation, subject to the effluent regulations and water quality standards for subsurface waters (see II.B. Class III Wells, supra).

This discussion will be limited to a consideration of the one type of Class V well addressed in the Missouri program, heat pump return flow injection wells. This type of Class V is regulated by both § 577.155 and Chapter 204, as well as the rules and regulations of the Missouri Clean Water Commission.

Section 577.155.1 provides that it shall be unlawful to construct or use any waste disposal well located in the state. Section 577.155.4(2) provides that:

4. It shall not be a violation of this section to:

\*\*\*

(2) Inject or return water into subsurface formations pursuant to chapter 204, RSMo, and section 192.020, RSMo, in connection with the following instances:

(a) Any groundwater heat pump injection/withdrawal well that is limited to a single family residence;

(b) Any groundwater heat pump injection/withdrawal well that is limited to eight or less single family residences as long as the combined injection/withdrawal rate is less than six hundred thousand British Thermal Units per hour;

(c) All other uses of groundwater heat pump injection/withdrawal wells shall be subject to a permitting procedure as established and regulated by the clean water commission;

Pursuant to § 577.155.4(2)(c), the Missouri Clean Water Commission has promulgated rules and regulations to permit groundwater heat pump injection/withdrawal wells. Regulation 10 CSR 20-6.070(1)(B) provides that:

(B) All persons who build, erect, alter replace, operate, use or maintain existing or proposed ground water heat pump injection/withdrawal wells shall apply to the department for the permits required by section 577.155 RSMo (Supp. 1980) and these regulations. The department shall issue these permits in order to enforce section 577.155 RSMo (Supp. 1980) and the Missouri Clean Water Law and regulations.

"Persons", as defined in 10 CSR 20-2.010(26) includes:

Any individual, partnership, co-partnership, firm, company, public or private

corporation, association, joint stock company, trust, estate, political subdivision, or any agency, board, department, or bureau of the state or federal government, or any other legal entity whatever, which is recognized by law as the subject of rights and duties.

Regulation 10 CSR 20-6.070(1)(A) exempts from this permit requirement any ground water heat pump injection/withdrawal well that is limited to a single family residence or that is limited to eight or fewer single family residences as long as the combined injection/withdrawal rate is less than six hundred thousand British Thermal Units per hour.

Regulation 10 CSR 20-6.070(2)(B) requires that the permit applicant submit the following information:

- (1) The name and address of the company, organization, owner, or operator of the injection/withdrawal well;
- (2) Description of the structure and or process that will utilize the injection/withdrawal well;
- (3) Estimated depth of the well, the aquifer to be used, the casing and related well construction data as recommended by the state geologist;
- (4) The exact location of the well;
- (5) The maximum, minimum, and average daily volume of water that will be injected and withdrawn;
- (6) The maximum, minimum, and average temperature differentials and how they were calculated;
- (7) General specifications of the installation including the heat exchange unit, pump, and other structures; and

(8) A registered professional engineer's recommendation and justification on the number and location of sampling wells.

The Department of Natural Resources shall specify in the operating permit the maximum temperature differential allowed at two hundred (200) feet from the injection/withdrawal site and shall also specify the minimum number and location of sampling wells to be constructed (10 CSR 20-6.070(3)(D) and (E)). Permits are issued subject to the terms and conditions enumerated in 10 CSR 20-6.070(4). The terms and conditions include:

(1) The permittee shall operate and maintain the facility in accordance with § 577.155, Chapter 204, the rules and regulations of the Clean Water Commission, and the permit conditions;

(2) The permittee shall allow entry and inspection of the facilities by authorized representatives of the Department of Natural Resources and shall allow such representatives access to any records required to be kept by the terms and conditions of the permit;

(3) The permittee shall notify the Department of Natural Resources of any new or substantially different injection/withdrawal process sixty (60) days before the modification begins;

(4) The permittee shall provide the Department of Natural Resources with copies of the well location, driller's logs, sample logs, casing schedule, volume of water, temperature, water quality, and other information developed or determined for the completed installation;

(5) The permittee shall measure and record monthly for each well:

- a. The maximum, minimum, and average water temperature.
- b. The maximum, minimum and average injection/withdrawal rate.
- c. The total dissolved solids.

(6) The permittee shall submit an annual report which contains:

- a. The volume of water withdrawn and injected.
- b. Temperature records for each monitoring well.
- c. Copies of water quality analyses performed.

Permits are issued only for thermal discharges (10 CSR 20-6.070(5)(C)). Should a pollutant discharge other than a thermal discharge occur, it would be actionable as a violation of permit conditions under § 204.051.1(3). Furthermore, any pollution of subsurface waters caused by the discharge of water contaminants from a heat pump injection/withdrawal well would be unlawful under § 204.051.1(1).

The Clean Water Commission has the authority under § 204.026(9) to:

Issue, modify, or revoke orders prohibiting or abating discharges of water contaminants into the waters of the state or adopting other remedial measures to prevent, control or abate pollution.

Corrective action is also authorized by § 204.056.3, which provides in part:

In case of the failure by conference, conciliation or persuasion to correct or remedy any claimed violation, or as required to immediately and effectively halt or eliminate any imminent or substantial endangerments to the health or welfare of persons resulting from the discharge of pollutants, the executive secretary shall order abatement or file an abatement complaint with the commission if no permit has been issued, or in addition may file a complaint to revoke a permit if such permit has been issued. . . . The commission may sustain, reverse, or modify the executive secretary's order or may make such other orders as the commission deems appropriate under the circumstances. . . .

Thus, we believe that the Commission has the authority to order corrective action if a heat pump injection/withdrawal well threatens to pollute an underground source of drinking water. In addition, under § 204.076.1, injunctive relief may be sought to prevent the violation or further violation of any provision of Chapter 204, the rules, regulations or orders of the Clean Water Commission, the condition of any permit issued by the Commission, or any other provision which the state is required to enforce under any federal water pollution control act.

*Attorney General of Missouri*

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October 28, 1982

ADDENDUM TO OPINION LETTER NO. 63 (1982)

Fred A. Lafser  
Director  
Department of Natural Resources  
Post Office Box 176  
Jefferson City, Missouri 65102

Dear Mr. Lafser:

This replies to your letter dated July 14, 1982, in which you requested an Attorney General's opinion on various questions relating to the authority of the State of Missouri to administer an underground injection control program which meets the requirements of the Federal Safe Drinking Water Act. We understand that the five questions that you submitted were in response to a request by the Environmental Protection Agency for further clarification of matters contained in our Opinion Letter No. 63, issued March 29, 1982. What follows is intended to supplement Opinion Letter No. 63. All statutory references are to the Revised Statutes of Missouri (RSMo 1978) unless otherwise indicated. All regulatory references are to the Code of State Regulations (CSR).

1. State statutes and regulations provide the authority to regulate Class III and Class V injection wells so as to ensure that the operation of such wells does not endanger underground sources of drinking water.

Citation of Laws and Regulations

Section 204.016

Section 204.026

Section 204.051

Section 204.076

10 CSR 20-7.015

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10 CSR 20-7.031

(See also, authorities cited in Attorney General's Opinion Letter No. 63 at pp. 31, 40-41.)

Explanation of Authority

The question of the state's authority to regulate Class III and Class V injection wells so as to ensure the protection of underground sources of drinking water has been previously discussed in Attorney General's Opinion Letter No. 63, at pp. 30-39; 40-46. It is our opinion that a sufficient explanation of these issues is contained in Opinion Letter No. 63; nevertheless, we will attempt a further clarification.

Under Section 204.051.2, it is unlawful for any person to build or operate a water contaminant source that is subject to standards, rules or regulations unless he holds a permit from the Missouri Clean Water Commission. By definition, a well from which pollutants are or may be discharged is a water contaminant source (§ 204.016). Furthermore, standards, rules, and regulations have been promulgated by the Commission for subsurface waters (10 CSR 20-7.015(2); 10 CSR 20-7.031(3)). It therefore follows that Class III and Class V wells which discharge or which may discharge pollutants to subsurface waters are water contaminant sources for which permits from the Commission are required. Thus, in the absence of a permit, the use of a well which discharges or which may discharge pollutants is unlawful or, in the language of 40 CFR 123.051, "cannot legally occur." The operation of such a well without a permit would be enjoined under Section 204.076 and would be subject to civil penalties of \$10,000 per day under the same section.

In addition to the prohibition in Section 204.051 of the discharge of water contaminants from unpermitted sources, Regulations 10 CSR 20-7.015 and 10 CSR 20-7.031 contain water quality standards and effluent regulations for discharges to subsurface waters. Regulation 10 CSR 20-7.031(3) establishes general water quality criteria applicable to all waters of the state:

(3) General Criteria: The following water quality criteria shall be applicable to all waters of the state at all times. No water contaminant, by itself or in combination with other substances, shall prevent the waters of the state from being--

(A) free from substances in sufficient amounts to cause the formation of putrescent, unsightly or harmful bottom deposits, or interfere with beneficial uses;

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(B) free from oil, scum, and floating debris in sufficient amounts to be unsightly or interfere with beneficial uses;

(C) free from substances in sufficient amounts to cause unsightly color or turbidity, offensive odor or taste, or interfere with beneficial uses; and

(D) free from substances or conditions that have a harmful effect on human, animal, or aquatic life.

"Beneficial uses," as mentioned in 10 CSR 20-7.031(3)(A), (B), and (C), includes drinking water supplies (see definitions, 10 CSR 20-7.031(1)(B)(6)). Thus, any release of a water contaminant so as to interfere with the use of subsurface water as a drinking water source is proscribed by 10 CSR 20-7.031(3). We construe this proscription against the release of a water contaminant so as to interfere with the use of subsurface water as a drinking water source as equivalent to a prohibition against any injection practice which would endanger sources of drinking water.

We reiterate that there are presently no Class III injection wells in the State of Missouri (see Program Description). Should the need to regulate such wells arise in the future, the state has the authority under Section 204.026(8) to promulgate more specific rules to govern the discharge of water contaminants from Class III injection wells. At the present time, neither Class III nor Class V wells which discharge or which may discharge water contaminants could legally occur without a permit. Permitted or not, such wells could not lawfully operate so as to interfere with the use of groundwater as a drinking water source. We therefore conclude that state statutes and regulations provide the authority to regulate Class III and Class V injection wells so as to ensure that the operation of such wells does not endanger drinking water sources.

2. State statutes and regulations provide the authority to prohibit the injection of hazardous waste into oil or gas wells if such injection is unrelated to oil or gas well operations. The injection of produced fluids or fluids related to enhanced recovery operations is not prohibited, but is subject to the regulations of the Missouri Oil and Gas Council.

#### Citation of Laws and Regulations

Section 259.070

Section 260.355, RSMo Supp. 1981

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Section 260.360, RSMo Supp. 1981

Section 260.395, RSMo Supp. 1981

Section 260.425, RSMo Supp. 1981

Section 577.155, RSMo Supp. 1981

10 CSR 50-2.030

10 CSR 50-2.040

10 CSR 50-2.080

10 CSR 50-2.090

State ex rel. Citizens' Electric Lighting & Power Co.  
v. Longfellow, 69 S.W. 374 (Mo. 1902)

Explanation of Authority

Section 259.070(2) of the Oil and Gas Production Law gives the Missouri Oil and Gas Council the authority to regulate pursuant to rule:

(b) the shooting and chemical treatment of wells;

\* \* \*

(d) operations to increase ultimate recovery such as . . . the introduction of gas, water or other substances into producing formations; and

(e) disposal of highly mineralized water and oil field wastes.

Pursuant to this authority, the Oil and Gas Council has promulgated rules to govern the permitting and drilling of injection wells (10 CSR 50-2.030, 10 CSR 50-2.040). Regulation 10 CSR 50-2.090 requires that the approval of the state geologist be obtained prior to the disposal of injected fluids. Regulation 10 CSR 50-2.080 requires that monthly reports be submitted to the state geologist for all disposal of injected fluids and for all enhanced recovery operations.

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The Missouri Hazardous Waste Management Law is contained in Sections 260.350 to 260.430, RSMo 1978, as amended, RSMo Supp. 1981. Section 260.395.7 provides that it shall be unlawful for any person to construct, substantially alter or operate a hazardous waste facility without a permit from the Department of Natural Resources. "Hazardous waste facility" is defined in Section 260.360(10) as "any property that is intended or used for hazardous waste management including, but not limited to, storage, treatment and disposal sites." Disposal of hazardous wastes in an unpermitted disposal site is enjoined and is punishable by a penalty of ten thousand dollars per day under Section 260.425.1. Exempted from the coverage of the Hazardous Waste Management Law are fluids injected or returned into subsurface formations in connection with oil or gas operations regulated by the Missouri Oil and Gas Council pursuant to Chapter 259 (Section 260.355). The same exemption for injected or returned fluids in connection with oil or gas operations is included in Section 577.155, which prohibits the construction and use of waste disposal wells.

Reading these provisions together, we conclude that the disposal of injected fluids in oil or gas wells is not prohibited by the Hazardous Waste Management Law or by Section 577.155, so long as such injection is directly related to oil and gas field operations. Such injection would be subject to the Oil and Gas Council regulations in 10 CSR 50-2. Disposal of hazardous wastes which are not either an oil field waste or a part of enhanced recovery operations would not be covered by the Oil and Gas Production Law, but would be proscribed by Section 577.155. Because such disposal would be absolutely prohibited under Section 577.155, the Department of Natural Resources could not grant a hazardous waste permit for this activity under Section 260.395.7. State ex rel. Citizens' Electric Lighting & Power Co. v. Longfellow, 69 S.W. 374, 379 (Mo. 1902).

3. State statutes and regulations impose adequate criminal and civil penalties for violations of the injection well statutes and regulations.

#### Citation of Laws and Regulations

Section 204.016

Section 204.076

Section 260.395, RSMo Supp 1981

Section 260.425, RSMo Supp. 1981

Section 577.155, RSMo Supp. 1981

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Section 558.011

Section 560.016

Section 560.021

(See also, authorities cited in Attorney General's Opinion Letter No. 63, pp. 27, 29, 40.)

Explanation of Authority

The federal regulations at 40 CFR 123.9 require that a state administering an underground injection control program have the authority to sue for civil and criminal penalties for violations of the state program requirements. Under the regulations, civil penalties shall be recoverable in the amount of at least one thousand dollars per day for Class II injection wells and in the amount of at least two thousand five hundred dollars per day for Class I, III, IV, and V wells. Criminal penalties shall be recoverable in the amount of at least five thousand dollars per day.

State penalty provisions for Class II wells satisfy the requirements of 40 CFR 123.9, as discussed in Attorney General's Opinion Letter No. 63, at pp. 27-28. Class III and V wells are covered by Sections 204.006-204.141, the Missouri Clean Water Law, as discussed at pp. 30-36; 40-46 of Opinion Letter No. 63. Section 204.076 provides for civil penalties of up to ten thousand dollars per day and criminal penalties of up to twenty-five thousand dollars per day for violations of Sections 204.006-204.141. These penalty provisions also satisfy 40 CFR 123.9.

Class I and IV injection wells are prohibited by Section 577.155, and the construction and use of such wells is subject to criminal penalties. Civil penalties, however, are not available under Section 577.155. Under this section the construction or use of a waste disposal well is a Class A misdemeanor, punishable by a term of imprisonment of up to one year (Section 558.011), and/or a fine of up to one thousand dollars if the offender is a person, and a fine of up to five thousand dollars if the offender is a corporation (Sections 560.016, 560.021).

The penalty provisions under Section 577.155 for Class I and IV wells do not satisfy the requirement of 40 CFR 123.9, because of the absence of civil penalties and because the amount of the criminal fine is less than five thousand dollars for some offenders. Nevertheless, other sanctions which do meet the requirements of 40 CFR 123.9 are available to address Class I and IV wells.

Fred A. Lafser

Class I and IV wells which dispose of hazardous waste would be subject to the civil and criminal penalties of the Missouri Hazardous Waste Management Law, in addition to the sanctions of Section 577.155. The construction and use of Class IV wells, and Class I wells which dispose of hazardous waste, would violate Section 260.395.7, which prohibits the construction, alteration, or use of a hazardous waste facility without a permit. Of course, no permit could be issued for these wells in light of the prohibition in Section 577.155. Section 260.425 provides for civil penalties of up to ten thousand dollars per day and criminal penalties of up to twenty-five thousand dollars per day for violations of Sections 260.350-260.430. These penalties meet the requirements of 40 CFR 123.9.

Class I and IV wells which dispose of wastes which cannot be defined as hazardous wastes would be subject to the civil and criminal penalties of the Missouri Clean Water Law. Any such well which discharges or may discharge a pollutant to waters of the state would fall within the definition of both "point source" as defined in Section 204.016(6) and "water contaminant source" as defined in Section 204.016(13). As previously discussed in paragraph 1 of this letter, the operation of a water contaminant source without a permit from the Clean Water Commission is unlawful. No permit could be issued for those wells in light of the prohibition in Section 577.155. Section 204.076 provides for civil penalties of up to ten thousand dollars per day and criminal penalties of up to twenty-five dollars per day for violations of Sections 204.006-204.141. These penalties meet the requirements of 40 CFR 123.9.

4. State statutes and regulations provide the authority to regulate all injection well activities on federal lands and by federal agencies.

#### Citation of Laws and Regulations

Section 204.016

Section 260.360, RSMo Supp. 1981

Section 577.155, RSMo Supp. 1981

(See also, authorities cited in Attorney General's Opinion Letter No. 63 at p. 15.)

#### Explanation of Authority

This question has previously been addressed in regard to Class II injection wells in Attorney General's Opinion Letter No. 63, at pp. 15-18. We expressed some reservation as to the state's authority to require a bond to be furnished for wells drilled on

Fred A. Lafser

federal lands. However, the inability to require a bond for operations on federal lands does not prevent the state from requiring compliance by the operator with all other Oil and Gas Council regulations. Furthermore, we find no requirement in the Safe Drinking Water Act or the regulations promulgated pursuant thereto that injection wells be bonded. Our conclusion remains that the state has the authority to regulate all Class II injection well activity on federal land.

Class I, III, IV, and V wells are regulated by one or more of the following statutes: Sections 204.006-204.141 (Missouri Clean Water Law), Sections 260.350-260.430 (Missouri Hazardous Waste Management Law), and Section 577.155 (waste disposal wells). In Section 204.016(5), "person" is defined to include "any agency, board, department, or bureau of the state or federal government." "Person" is defined in the same manner in Section 260.360(13). Section 577.155 provides that "no person, firm, corporation or political subdivision shall construct or use any waste disposal well located in this state." Each of these statutes applies to federal agencies in the same manner as it does to any other person or legal entity.

5. State statutes and regulations provide authority for any information contained or used in the administration of the state underground injection control program, including information submitted to the state under a claim of confidentiality, to be available to EPA upon request without restriction.

#### Citation of Laws and Regulations

Section 204.026

Section 259.070

10 CSR 50-2.050

#### Explanation of Authority

Two statutes affect the disclosure of information which may be obtained by the state related to injection wells. The disclosure of information related to Class III and Class V injection wells is controlled by the provisions of the Missouri Clean Water Law, Sections 204.006-204.141; that related to Class II injection wells is controlled by the Missouri Oil and Gas Production Law, Chapter 259. Because Class I and IV injection wells are unlawful under Section 577.155, no information concerning them would be subject to confidentiality requirements.

Fred A. Lafser

Section 204.026(20) governs the disclosure of information obtained by the Department of Natural Resources or the Clean Water Commission under the Missouri Clean Water Law. The general rule is that all information will be made available to the public. However, if the information constitutes trade secrets or confidential information, other than effluent data, it shall be kept confidential unless disclosure is required under any federal water pollution control act.

Oil and Gas Council Regulation 20 CSR 50-2.050, promulgated pursuant to Section 259.070, limits the disclosure of information related to Class II injection wells. It provides that sample cuttings, cores, and logs related to the drilling of wells are required to be submitted to the state geologist. Such data shall be considered confidential for one year when so requested in writing by the owner.

We note that certain information submitted to EPA under the federal program is also subject to nondisclosure requirements. EPA has promulgated regulations at 40 CFR Part 2 governing the handling of information submitted under claim of confidentiality. One of the categories of information which is subject to federal confidentiality requirements is confidential business information. 40 CFR 2, Subpart B. We read the federal regulations to provide protection for as broad a category of business information as is protected by Section 204.026(20) and 10 CSR 50-2.050. See 5 U.S.C. § 552(b)(4); 40 CFR 2.201(e), 2.208(c), and 2.208(e)(1). Geological and geophysical information concerning wells is also exempted from mandatory disclosure under federal law. 5 U.S.C. § 552(b)(9); 40 CFR 2.118(a)(9). We believe that sample cuttings, cores, and logs required to be submitted to the state geologist under 10 CSR 50-2.050 fall within this category of exempted information.

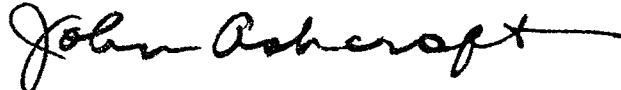
In light of the fact that federal regulations at 40 CFR Part 2 facially provide the same degree of protection for trade secrets, confidential business information, and geotechnical information as is provided by the state statute, we believe that Section 204.026(10) and 10 CSR 50-2.050 do not prohibit the state from sharing such information with EPA. So long as EPA can protect the information to the same extent as the state, assuming protection is warranted, we do not view EPA as being a part of the "public," as that term is used in Section 204.026(20). Under such circumstances, EPA would be entitled to information submitted to the state, even if submitted to the state under a claim of confidentiality. Of course, all information not subject to confidentiality claims would be available to EPA, the same as any other person, without restriction.

Fred A. Lafser

Our opinion in regard to the above is premised exclusively on the protection facially afforded by 40 CFR Part 2 against improper disclosure of confidential information. Should EPA amend 40 CFR Part 2 to materially lessen the protections afforded thereunder, or should it appear that EPA is not following its own regulations, we would have to reexamine our opinion.

The foregoing addendum to Opinion Letter No. 63 (1982), which I hereby approve, was prepared by my assistant, Kirk Lohman.

Yours very truly,

A handwritten signature in black ink, reading "John Ashcroft". The signature is written in a cursive style with a long horizontal flourish extending to the right.

JOHN ASHCROFT  
Attorney General

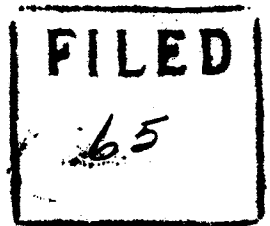
PROFESSIONAL CORPORATIONS:  
CORPORATIONS:

Persons engaged in professions  
or occupations other than those  
delineated in Section 356.020(2)  
may not form professional corpora-  
tions under Chapter 356.

April 23, 1982

OPINION NO. 65

The Honorable James C. Kirkpatrick  
Secretary of State  
State Capitol Building  
Jefferson City, MO 65101



Dear Mr. Secretary:

This opinion is in response to your questions:

1. May any occupation other than those specifically delineated in 356.020(2) form a professional corporation pursuant to 356.040?
2. If the answer to question one is yes, which occupations not set forth in 356.020(2) may form corporations pursuant to Chapter 356?

A "professional corporation" is a corporation organized under The Professional Corporation Law of Missouri, Chapter 356, RSMo 1978. See Section 356.020(1).

Section 356.040 provides in pertinent part:

1. One or more natural persons, each of whom is licensed to render the same type of professional service within this state, may incorporate a professional corporation to practice that same type of professional service by filing articles of incorporation with the secretary of state. The articles of incorporation shall set forth as its purpose the type of professional service to be practiced through the professional corporation . . . .

The Honorable James C. Kirkpatrick

Section 356.050 states that "[a] professional corporation may be organized only for the purpose of rendering one type of professional service and service ancillary thereto and shall not engage in any other business . . . ."

Section 356.140 states:

A professional corporation may render professional service only through its officers, employees and agents who are duly licensed to render that professional service. A professional corporation may employ unlicensed persons but these persons shall render only those services which are considered by custom and practice to be ancillary or incidental to the professional services for which the corporation was organized.

The phrase "professional services" as used in Chapter 356 is defined in Section 356.020 as follows:

(2) "Professional services", the type of personal service rendered by a person duly licensed by this state as a member of any of the following professions, each paragraph constituting one type:

- (a) An accountant;
- (b) An architect or engineer;
- (c) An attorney at law;
- (d) A chiropodist-podiatrist;
- (e) A chiropractor;
- (f) A dentist;
- (g) An optometrist;
- (h) A physician, surgeon, doctor of medicine, or doctor of osteopathy;
- (i) A veterinarian[.]

The powers and very existence of corporations are derived from the state. Pacific Intermountain Express Co. v. Best Truck

The Honorable James C. Kirkpatrick

Lines, Inc., 518 S.W.2d 469, 472 (Mo.App. 1974). "[T]he Legislature of this state has plenary power to create corporations and prescribe the business in which they may engage." Sylvester Watts Symth Realty Co. v. American Surety Co., 238 S.W. 494, 497 (Mo. 1922). See also Molasky Enterprises, Inc. v. Carps, Inc., 615 S.W.2d 83, 86 (Mo.App. 1981).

Nowhere in Section 356.020, or elsewhere in Chapter 356, is there any authorization, expressed or implied, for persons engaged in other professions or occupations to form professional corporations. Under the rule of statutory construction that "the express mention of one thing implies the exclusion of another," Harrison v. MFA Mutual Co., 607 S.W.2d 137, 146 (Mo. banc 1980), it is fair to conclude, as we do, that the General Assembly's specific delineation of the "professional services" that may be rendered by professional corporations evinces a legislative intent that persons engaged in other professions or occupations may not form professional corporations under Chapter 356.

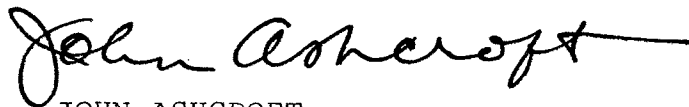
In light of our conclusion above, we do not reach your second question.

#### CONCLUSION

It is the opinion of this office that persons engaged in professions or occupations other than those delineated in Section 356.020(2) may not form professional corporations under Chapter 356.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Charles R. Miller.

Yours very truly,



JOHN ASHCROFT  
Attorney General

SCHOOLS: A school district which provides only an  
SCHOOL AID: elementary school program is not authorized  
SCHOOL BOARDS: to begin a ninth grade for its resident  
SCHOOL DISTRICTS: ninth grade students, and such district is  
not entitled to state aid under Section  
163.031, RSMo 1978, for the ninth grade students attending such un-  
authorized ninth grade program.

October 28, 1982

OPINION NO. 67

Dr. Arthur L. Mallory  
Commissioner of Education  
Department of Elementary and  
Secondary Education  
Post Office Box 480  
Jefferson City, Missouri 65102



Dear Dr. Mallory:

This is in response to your request for an official opinion on the following questions:

1. Is a school board which provides only an elementary program, K-8, authorized by law to begin a 9th grade for its resident 9th grade students?
2. If it is determined that the board is not authorized by law to operate a 9th grade program, is the district entitled to state aid under Section 163.031, RSMo, for 9th grade students if it begins a 9th grade program?

A school board, as a creature of statute, can exercise only the authority that is expressly conferred upon it or is necessarily implied from the powers that are conferred. Cape Girardeau School Dist. No. 63 v. Frye, 225 S.W.2d 484, 488 (Mo.App. 1949). Sections 177.091 and 177.131, RSMo 1978, grant to school boards the authority to establish elementary schools and high schools.

Section 160.011, RSMo 1978, as amended by Senate Bill No. 832, Laws 1982, effective August 13, 1982, provides in relevant part:

As used in [Chapter 177, RSMo], unless the context otherwise requires:

\* \* \*

Dr. Arthur L. Mallory

(2) "Elementary school" means a public school giving instruction in two or more grades not higher than the eighth grade;

\*

\*

\*

(4) "High school" means a public school giving instruction in two or more grades not lower than the ninth nor higher than the twelfth grade[.] [Emphasis added.]

Thus, by explicit statutory definition, an "elementary school" may not include any grade higher than the eighth grade, and a "high school" must include at least two grades not lower than the ninth grade. Therefore, we believe that a school district which operates only an elementary school is without authority to establish a ninth grade for its resident ninth grade students.

Section 163.031, RSMo 1978, contains the formula whereby state aid is distributed to local school districts for the provision of educational services to resident pupils in the district. It is generally held that the disbursement of state funds is regulated by the Constitution or by statute and may be disbursed only for purposes and in the manner therein described. 81A C.J.S. States § 226 (1977). Furthermore, an appropriation to a state agency or department can only be used for purposes and objects within the authority of the agency or department. 81A C.J.S. States § 241 (1977). See generally, State v. Weatherby, 129 S.W.2d 887 (Mo. 1939).

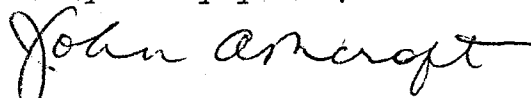
Since a school board which operates only an elementary school program is not authorized to also provide ninth grade instruction, the State Board of Education is without authority to disburse state funds to such district for its resident ninth grade pupils receiving such unauthorized instruction.

#### CONCLUSION

It is the opinion of this office that a school district which provides only an elementary school program is not authorized to begin a ninth grade for its resident ninth grade students, and that such district is not entitled to state aid under Section 163.031, RSMo 1978, for the ninth grade students attending such unauthorized ninth grade program.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Leslie Ann Schneider.

Very truly yours,



JOHN ASHCROFT  
Attorney General

*Attorney General of Missouri*

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

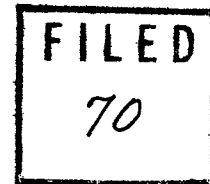
JOHN ASHCROFT  
ATTORNEY GENERAL

(314) 751-3321

June 7, 1982

OPINION LETTER NO. 70  
[corrected]

Dr. Arthur L. Mallory  
Commissioner of Education  
Department of Elementary and  
Secondary Education  
Jefferson State Office Building  
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This letter is in response to your request for our review and certification of the Department of Elementary and Secondary Education's Annual Program Plan for Adult Education 1983-1985 under the Adult Education Act of 1970, as amended.

Our review has taken into consideration the Adult Education Act of 1970, 20 U.S.C. §§ 1201 et seq., as amended; the federal regulations applicable to such act, 34 C.F.R. parts 75-78, 425-426, 431-432; Article III, Section 38(a), Article IV, Section 15, and Article IX, Sections 1(b), 2(a), and 2(b), Missouri Constitution; Sections 161.092, 171.091, 171.096, and 178.430, RSMo, and related provisions.

It is the opinion of this office that:

1. The Missouri Department of Elementary and Secondary Education is the state agency primarily responsible for the state supervision of public elementary and secondary schools and is, therefore, the "state education agency" as that term is defined in 20 U.S.C. § 1202(h).

2. The Department of Elementary and Secondary Education has the authority under state law to submit this Annual Program Plan.

Dr. Arthur L. Mallory

3. The State Treasurer has authority under state law to receive, hold and disburse federal funds under the Annual Program Plan.

4. All of the provisions of the foregoing plan are consistent with state law.

5. The state legally may carry out each provision of the Plan.

6. The Missouri Commissioner of Education has authority to submit the Plan.

7. The State Board of Education, as head of the Department of Elementary and Secondary Education, has formally approved the Plan.

8. The Plan is the basis for state operation and administration of the program, along with applicable state statutes and constitutional provisions.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft". The signature is written in dark ink and is positioned above the typed name and title.

JOHN ASHCROFT  
Attorney General

CHILD LABOR:  
LABOR AND INDUSTRIAL RELATIONS:

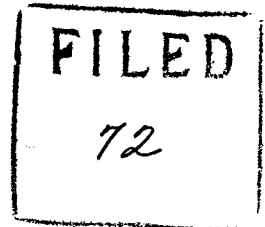
The federal Fair Labor  
Standards Act pre-empts  
the Missouri Child Labor

Law, Chapter 294, RSMo, to the extent, if any, that the Missouri Child Labor Law is in conflict with the intent and policy of the federal Act. However, the Fair Labor Standards Act was not intended by Congress to prohibit state regulation of child labor by occupying the whole field in this area, but instead leaves the states free to enact laws either more restrictive to employers or more favorable to employees. The state is also free to regulate in any manner it deems proper any areas exempted from the coverage of the Fair Labor Standards Act, or any subject areas not falling within the Act's definition of "commerce".

November 18, 1982

OPINION NO. 72

The Honorable Paula V. Smith  
Director  
Department of Labor and Industrial Relations  
421 East Dunklin Street  
Jefferson City, Missouri 65101



Dear Mrs. Smith:

This opinion is in response to your question asking:

Does the United States Fair Labor Standards  
Act have priority over Missouri Child Labor  
Laws, Chapter 294-RSMo.

The child labor provisions of the federal Fair Labor  
Standards Act, 29 U.S.C. § 212, state in relevant part:

(a) No producer, manufacturer, or dealer  
shall ship or deliver for shipment in  
commerce any goods produced in an estab-  
lishment situated in the United States  
in or about which within thirty days  
prior to the removal of such goods  
therefrom any oppressive child labor  
has been employed; . . .

(c) No employer shall employ any oppressive  
child labor in commerce or in the produc-  
tion of goods for commerce or in any

The Honorable Paula V. Smith

enterprise engaged in commerce or in the production of goods for commerce.

Title 29 U.S.C. § 213(c) and (d) lists four occupations which are exempted from the above-quoted provisions § 212. They are: agriculture, the delivery of newspapers to the consumer, homeworkers engaged in the making of wreaths composed principally of natural holly, pine, cedar or other evergreens, and actors or performers in motion pictures, theatrical productions, or radio or television productions.

Also, § 212 of the federal Act is limited in its coverage under both subsections (a) and (c) by the definitions of "in commerce," and "in the production of goods for commerce." "Commerce" is defined in 29 U.S.C. § 203(b) as "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." In Mitchell v. Zachry Company, 362 U.S. 310, 4 L.Ed.2d 753, 80 S.Ct. 739 (1960), the United States Supreme Court held that:

By confining the Act to employment "in commerce or in the production of goods for commerce," Congress has impliedly left to the States a domain for regulation. For want of a provision for an administrative determination, by an agency like the National Labor Relations Board, the primary responsibility has been vested in courts to apply, and so to give content to, the guiding yet undefined and imprecise phrases by which Congress has designated the boundaries of that domain. 362 U.S. at 314.

Without going into a detailed definition of the term "commerce," which is not necessary for the purposes of this opinion, it is clear that the Fair Labor Standards Act has not been construed to prohibit any and all state regulation of this subject. In fact, 29 U.S.C. § 218(a), states in relevant part:

No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum work week established under this chapter, and no provi-

The Honorable Paula V. Smith

sion of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter. [emphasis added]

See also, Maccabees Mutual Life Insurance Company v. Perez-Rosado, 641 F.2d 45, 46[2, 3] (1st Cir. 1981); Doctors Hospital, Inc. v. Silva Recio, 558 F.2d 619, 622[2] (1st Cir. 1977).

The term "oppressive child labor," as used in 29 U.S.C. § 212, is defined in 29 U.S.C. § 203(1) as:

[A] condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or in a occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing

The Honorable Paula V. Smith

and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

That term is further explained in 29 CFR §§ 570.117-570.126, with guidelines concerning conditions of employment in the specific situations set out therein.

Title 29 CFR § 570.129 also provides in relevant part that:

The child labor requirements of the Fair Labor Standards Act, as amended, must be complied with as to the employment of minors within their general coverage and not excepted from their operation by special provision of the act itself regardless of any State, local, or other Federal law that may be applicable to the same employment. Furthermore, any administrative action pursuant to other laws, . . . . does not necessarily relieve a person of liability under this act. Where such other legislation is applicable and does not contravene the requirements of the Fair Labor Standards Act, however, nothing in the act, the regulations or the interpretations announced by the Secretary should be taken to override or nullify the provisions of these laws. Although compliance with other applicable legislation does not constitute compliance with the act unless the requirements of the act are thereby met, compliance with the act, on the other hand, does not relieve any person of liability under other laws that establish higher child labor standards than those prescribed by or pursuant to the act. Moreover, such laws, if at all applicable, continue to apply to the employment of all minors who either are not within the general coverage of the child labor provisions of the act or who are specifically excepted from their requirements.

The Honorable Paula V. Smith

While it is obvious that the Missouri Child Labor Law would be pre-empted should its provisions conflict with those of the Fair Labor Standards Act with respect to a subject area within the jurisdiction of the federal Act, it is also apparent that the intent of Congress in enacting the federal Fair Labor Standards Act, particularly as to its child labor provisions, was not to occupy the entire field in this area. Instead, the Act was intended to create a minimum "floor" of regulations and standards to be followed in the area, and to leave the states free to enact standards either more restrictive to the employer or more favorable to the employee in areas within the coverage of the federal law. In areas exempted under the federal law or outside the realm of "commerce," the Act was intended to allow the states to regulate in any manner they deem proper.

#### CONCLUSION

It is the opinion of this office that the federal Fair Labor Standards Act pre-empts the Missouri Child Labor Law, Chapter 294, RSMo, to the extent, if any, that the Missouri Child Labor Law is in conflict with the intent and policy of the federal Act. However, the Fair Labor Standards Act was not intended by Congress to prohibit state regulation of child labor by occupying the whole field in this area, but instead leaves the states free to enact laws either more restrictive to employers or more favorable to employees. The state is also free to regulate in any manner it deems proper any areas exempted from the coverage of the Fair Labor Standards Act, or any subject areas not falling within the Act's definition of "commerce."

The foregoing opinion, which I hereby approve, was prepared by my assistant, Carl S. Yendes.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT  
Attorney General

STATE AUDITOR: Southwest Missouri State University  
STATE COLLEGES: is not required to obtain the approval  
RULES AND REGULATIONS: of the State Auditor prior to entering  
AUDITING: into a contract for audit services  
AUDITS: with a private accounting or auditing  
firm.

November 18, 1982

OPINION NO. 73

The Honorable James F. Antonio  
State Auditor  
State Capitol Building  
Jefferson City, Missouri 65101

FILED

73

Dear Dr. Antonio: -

You have requested this office to render an opinion on the following question:

If Southwest Missouri State University proposes to enter into an agreement with a private accounting or auditing firm whereby the private firm is to provide audit services for the University, is the University required to obtain the approval of the State Auditor prior to entering into such agreement.

There is no such requirement imposed by statute, either in Chapter 29, RSMo, pertaining to the State Auditor, or in Chapter 174, RSMo, pertaining to state colleges. The resolution of your question will therefore revolve around a pertinent rule promulgated by the State Auditor and its validity.

The State Auditor has authority under Section 29.100, RSMo 1978, to promulgate "reasonable rules and regulations for the administration and enforcement of his powers and duties under the provisions of this chapter." Acting under this authority, the Auditor has promulgated the following rule, found at 15 CSR 40-2.020(1):

No state officer, agency or institution shall enter into any agreement with any accounting or auditing firm or employ any person to perform audit functions or establish accounting systems until a copy of the contract or agreement has been approved by the state auditor in writing.

The Honorable James F. Antonio

The question presented brings into issue only that portion of the rule which pertains to contracts for audit functions. For the purposes of this opinion, the phrase "audit services" as used in the opinion request will be taken as equivalent to "audit functions" as used in 15 CSR 40-2.020(1), and distinguishable from "establish[ing] accounting systems" as used in the rule.

Southwest Missouri State University is a state institution within the intendment of 15 CSR 40-2.020(1), and is therefore within the category of institutions to which the rule is generally applicable. If the rule is a valid exercise of the authority of the State Auditor under Section 29.100, RSMo 1978, the question presented must be answered in the affirmative; if the rule is not within the authority of the State Auditor, the question must be answered in the negative.

In order for 15 CSR 40-2.020(1) to be a valid exercise of the Auditor's rule-making authority under Section 29.100, RSMo 1978, it must be reasonable, and it must have as its purpose the administration or enforcement of some power or duty conferred upon the State Auditor under Chapter 29, RSMo. Because of the conclusion reached in this opinion, it is unnecessary to discuss whether 15 CSR 40-2.020(1) is reasonable within the meaning of Section 29.100, RSMo 1978.

Section 29.200, RSMo 1978, is of all sections in Chapter 29, RSMo, most closely related to the subject matter of 15 CSR 40-2.020(1). It will therefore be examined to determine whether it gives the Auditor any power or duty the administration or enforcement of which is implemented by 15 CSR 40-2.020(1).

Section 29.200, RSMo 1978, provides:

The state auditor shall postaudit the accounts of all state agencies and audit the treasury at least once annually. Once every two years, and when he deems it necessary, proper or expedient, the state auditor shall examine and postaudit the accounts of all appointive officers of the state and of institutions supported in whole or in part by the state. He shall audit any executive department or agency of the state upon the request of the governor.

The Honorable James F. Antonio

This section requires the State Auditor to postaudit the accounts of all state agencies. In order for the Auditor to perform this function, however, it is not necessary for the Auditor to have approval authority over contracts between state agencies and private auditing firms for auditing services. Rule 15 CSR 40-2.020(1), so far as it pertains to contracts for audit services, does not appear to be relevant to the administration or enforcement of any power or duty of the Auditor under Section 29.200, RSMo 1978, or under any other provisions in Chapter 29, RSMo.

The intent of 15 CSR 40-2.020(1) as it pertains to audit services appears to be to give the State Auditor broad power to regulate and control the relationship between state institutions and agencies and private auditing firms performing audit services. This is not a power granted the Auditor under Chapter 29, RSMo, nor is this broad power necessary for the Auditor to administer or enforce any power or duty granted under that chapter. Although the Auditor may well have a legitimate, statutory interest in preventing conflicts which might arise where the Auditor and a contractually retained, private auditing firm both sought to audit a state agency at the same time, prevention of this type of conflict does not appear to be the purpose of 15 CSR 40-2.020(1).

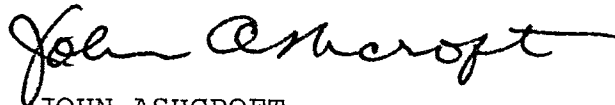
We therefore believe that Rule 15 CSR 40-2.020(1) exceeds the rule-making authority of the State Auditor under Section 29.100, RSMo 1978, to the extent that it requires prior approval by him of a contract for audit functions between a state agency or institution and a private accounting or auditing firm.

#### CONCLUSION

It is the opinion of this office that Southwest Missouri State University is not required to obtain the approval of the State Auditor prior to entering into a contract for audit services with a private accounting or auditing firm.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Scott A. Woodruff.

Sincerely yours,



JOHN ASHCROFT  
Attorney General

INSURANCE: Insurance companies and health  
HEALTH INSURANCE: services corporations issuing  
HEALTH BENEFITS: health insurance policies or  
DIVISION OF INSURANCE: contracts in this state are re-  
DEPARTMENT OF MENTAL HEALTH: quired to offer, as an optional  
HEALTH SERVICE CORPORATIONS: coverage under such policies or  
contracts, benefits for residen-  
tial and nonresidential treatment programs for alcoholism, chemical  
dependency and drug addiction.

June 21, 1982

OPINION NO. 74

Paul R. Ahr, Ph.D., M.P.A.  
Director  
Department of Mental Health  
2002 Missouri Boulevard  
Jefferson City, Missouri 65101



Dear Dr. Ahr:

This opinion is issued in response to your request which asks the following question:

Does section 376.779 RSMo. Supp. 1981 mandate that all insurance companies and health service corporations doing business in Missouri provide reimbursement (to limits specified) for residential and non-residential treatment programs, for alcoholism, chemical dependency and drug addiction, or does this section simply require that all insurance companies and health service corporations doing business in Missouri offer (as an option) coverage (to limits specified) for residential and non-residential treatment programs for alcoholism, chemical dependency and drug addiction? [Emphasis yours.]

Subsection 1 of Section 376.779, RSMo Supp. 1981, provides as follows:

All group health insurance policies providing coverage on an expense incurred basis, all group service or indemnity contracts issued by a not for profit health service corporation, all self-insured group health benefit plans, of any type or description, and all

Paul R. Ahr, Ph.D., M.P.A.

such health plans or policies that are individually underwritten or provide for such coverage for specific individuals and the members of their families as nongroup policies, which provide for hospital treatment, shall provide coverage for treatment of alcoholism on the same basis as coverage for any other illness, except that coverage may be limited to thirty days in any policy or contract benefit period. All Missouri group contracts issued or renewed, and all Missouri individual contracts issued on or after December 31, 1980, shall be subject to this section. Coverage required by this section shall be included in the policy or contract and payment provided as for other coverage in the same policy or contract notwithstanding any construction or relationship of interdependent contracts or plans affecting coverage and payment of reimbursement prerequisites under the policy or contract.

The matter of providing benefits for residential and nonresidential treatment programs for alcoholism, chemical dependency and drug addiction is expressly addressed in subsection 2 of Section 376.779, which states:

Every insurance company and health services corporation doing business in this state shall offer in all such policies or contracts referred to in subsection 1, benefits for alcoholism, chemical dependency, and drug addiction which cover the following:

(1) Residential treatment programs as licensed or certified by the department of mental health;

(2) Nonresidential treatment programs licensed or certified by the department of mental health.

The benefits in this subsection may be limited to eighty percent of the reasonable and customary charges for such services up to a maximum benefit of two thousand dollars during each policy or contract benefit period. Said offer may be accepted or rejected by the group or individual policyholder or contract holder or at their election they may take or purchase

Paul R. Ahr, Ph.D., M.P.A.

either or both of the benefits set out in (1) or (2); provided, however, that nothing in this section shall prohibit the insurance company and health services corporation from including all or part of the coverage set forth in this section as standard coverage in their policies or contracts issued in this state.

We believe it is clear that under Section 376.779.2, insurance companies and health services corporations are only required to offer, as an optional coverage, benefits for residential and nonresidential treatment programs for alcoholism, chemical dependency and drug addiction, which offer may be accepted or declined by their policyholders or contract holders.

#### CONCLUSION

It is the opinion of this office that insurance companies and health services corporations issuing health insurance policies or contracts in this state are required to offer, as an optional coverage under such policies or contracts, benefits for residential and nonresidential treatment programs for alcoholism, chemical dependency and drug addiction.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hannelore D. Fischer.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft", with a long horizontal flourish extending to the right.

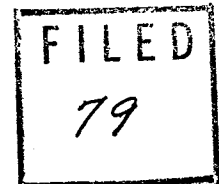
JOHN ASHCROFT  
Attorney General

SCHOOLS: Moneys received from the Fair Share  
SCHOOL FUNDS: Fund pursuant to Senate Committee  
TEACHERS FUND: Substitute for House Committee Sub-  
SCHOOL DISTRICTS: stitute for House Bills Nos. 1548  
SCHOOL BOARDS: and 1543 should be placed to the  
credit of the teacher's fund as pro-  
vided in Section 165.011, RSMo 1978. There is no requirement that  
the money received from the Fair Share Fund be spent for teachers'  
salaries in the fiscal year in which it was appropriated.

August 9, 1982

OPINION NO. 79

Dr. Arthur L. Mallory  
Commissioner of Education  
Department of Elementary and Secondary  
Education  
Jefferson State Office Building  
Jefferson City, Missouri 65101



Dear Dr. Mallory:

This opinion is issued in response to your request submitting  
the following questions:

1. Does Section 165.011, RSMo 1978, require that all money received by public school districts from the Fair Share Fund (SCS HCS HBs 1548 and 1543) be placed to the credit of the Teachers Fund? If this section does not require all moneys received from the Fair Share Fund be placed to the credit of the Teachers Fund, in what fund and in what proportion must the moneys be placed?
2. What proportion, if any, of the money received from the Fair Share Fund must be spent for teachers salaries in the fiscal year in which it was appropriated?

Senate Committee Substitute for House Committee Substitute for House Bills Nos. 1548 and 1543, enacted by the 81st General Assembly, Second Regular Session, provides that state moneys placed in a fund entitled "The Fair Share Fund" shall be distributed to the schools in Missouri. It does not include any provisions as to what fund(s) the money is to be credited by the schools.

Dr. Arthur L. Mallory

Section 165.011, RSMo 1978, provides for the establishment of various funds for the accounting of all school moneys paid to public school districts. That section further provides that "not less than eighty percent of the state moneys received under sections 162.975 and 163.031, RSMo, and all other moneys received from the state except as herein provided shall be placed to the credit of the teachers' fund."

This office previously held in Opinion No. 46 (1967) that money received by the State of Missouri from the National Forest Reserves and distributed to school districts was money received from the state and therefore to be placed to the credit of the teacher's fund. Similarly, it is our opinion that money distributed from the Fair Share Fund is money received from the state and should be placed to the credit of the teacher's fund.

Your second question asks what portion, if any, of the money received by school districts from the Fair Share Fund must be spent for teachers' salaries in the year in which it was appropriated. Subject to constitutional or statutory limitation, the administration of school funds is left to the discretion of the school board charged with its administration. 79 C.J.S. Schools and School Districts § 331 (1952). We find no constitutional or statutory provision requiring a school district to spend any portion of the money received from the Fair Share Fund in the fiscal year in which it was appropriated.

#### CONCLUSION

It is the opinion of this office that moneys received from the Fair Share Fund pursuant to Senate Committee Substitute for House Committee Substitute for House Bills Nos. 1548 and 1543 should be placed to the credit of the teacher's fund as provided in Section 165.011, RSMo 1978, and there is no requirement that the money received from the Fair Share Fund be spent for teachers' salaries in the fiscal year in which it was appropriated.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Leslie Ann Schneider.

Very truly yours,



JOHN ASHCROFT  
Attorney General

Enclosure: Opinion No. 46 (1967)

APPORTIONMENT:  
REAPPORTIONMENT:  
SENATORIAL DISTRICTS:  
SENATORIAL REDISTRICTING:  
POLITICAL COMMITTEES:  
CONSTITUTIONAL LAW:

The senatorial districts defined by the Judicial Commission Senate Plan, filed November 16, 1981, are to be used in determining senatorial district committees for the purpose of selecting party state committee members.

July 30, 1982

OPINION NO. 80



The Honorable Richard M. Webster  
Senator, District 32  
Room 331, State Capitol Building  
Jefferson City, Missouri 65101

Dear Senator Webster:

This is in response to your request for an opinion as follows:

Are the state committee people selected from  
the 1971 or the 1981 senatorial districts?

On November 16, 1981, the Judicial Commission filed its apportionment plan and map establishing new senatorial districts pursuant to Article III, Section 7, of the Missouri Constitution.

Article III, Section 7, further provides that after the filing of the senatorial apportionment plan "senators shall be elected according to such districts until a reapportionment is made as herein provided."

Section 115.621.2, RSMo 1978, outlines the procedures to be followed in selecting the party state committees:

The members of each senatorial district committee shall meet at some point within the district, to be designated by the current chairman of the committee, if there be one, and if not by the chairman of the congressional district in which the senatorial district is

The Honorable Richard M. Webster

principally located, on the Wednesday after the last Tuesday in August after each primary election. At the meeting, the committee shall organize by electing one of its members as chairman and one of its members as vice chairman, one of whom shall be a woman, and a secretary and a treasurer, one of whom shall be a woman, who may or may not be members of the committee. Having so organized, the committee shall proceed to elect two registered voters of the district, one man and one woman, as members of the party state committee.

We believe that the quoted portion of Article III, Section 7, stands for the proposition that for purposes of defining senatorial districts, the filing of the apportionment plan and map by the Judicial Commission terminates the existence of the old senatorial districts. While some exceptions to this general rule exist for such things as filling vacancies before all state senators are elected under the apportionment plan (Section 21.120, RSMo 1978), for purposes of your question, we conclude that state committee members must be selected according to the new (1981) senatorial districts regardless of whether such districts are odd or even numbered.

#### CONCLUSION

It is the opinion of this office that the senatorial districts defined by the Judicial Commission Senate Plan, filed November 16, 1981, are to be used in determining senatorial district committees for the purpose of selecting party state committee members.

Very truly yours,



JOHN ASHCROFT  
Attorney General

REDISTRICTING:  
WARDS-WARD LINES:  
COUNTY COMMITTEE:  
POLITICAL COMMITTEES:

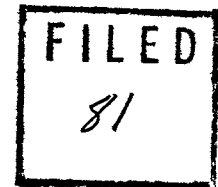
The terms of office of incumbent members of the political party committees in the City of St. Louis are not affected by subsequent changes in ward boundary lines, and such persons con-

tinue to represent their wards as constituted at the time of their election.

August 12, 1982

OPINION NO. 81

The Honorable Richard M. Webster  
Senator, District 32  
Room 331, State Capitol Building  
Jefferson City, Missouri 65101



Dear Senator Webster:

This is in response to your recent opinion request which asks:

[W]hether or not the 56 committee people in the City of St. Louis presently represent the 28 St. Louis wards at the time of reorganization of the city and county.

You state that because of recent changes in ward boundaries in the City of St. Louis, several incumbent members of the political party committees in that city "no longer reside in the wards from which they were elected."

The tenure of members of the political party committees in the City of St. Louis is governed by Section 115.609, RSMo 1978, which provides in relevant part:

In each city not situated in a county . . . , all members of the county committee shall be elected at the primary election immediately preceding each gubernatorial election and shall hold office until their successors are elected and qualified.

We believe that the provisions of Section 115.609 are clear; members of the political party committees in the City of St. Louis are elected at the primary election preceding each gubernatorial election and serve until their successors are elected and qualified four years later. It is our view that changes in ward boundaries do not affect the terms of office of incumbent party committeemen

The Honorable Richard M. Webster

and committeewomen and that they continue to represent their wards as constituted at the time of their election.

CONCLUSION

It is the opinion of this office that the terms of office of incumbent members of the political party committees in the City of St. Louis are not affected by subsequent changes in ward boundary lines, and that such persons continue to represent their wards as constituted at the time of their election.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft". The signature is written in dark ink and is positioned above the typed name and title.

JOHN ASHCROFT  
Attorney General

PUBLIC SCHOOL RETIREMENT SYSTEM:  
SICK LEAVE PAYMENTS AND SICK LEAVE:  
RETIRED STATE EMPLOYEES:

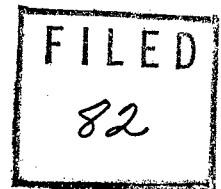
The Public School Retirement System of Missouri is required under Section 104.601, RSMo Supp. 1982,

to allow creditable service for unused sick leave in calculating retirement benefits for those members employed by agencies of the State of Missouri other than institutions of higher learning, but the provisions of that section do not apply to those members who are not employed by a state agency. In calculating the retirement benefits for such members, The Public School Retirement System of Missouri is required under Section 104.601 to include any creditable service for unused accumulated sick leave in addition to the creditable service for actual services, and the allowance of such unused sick leave credit may not be deferred to the period following the date of last services.

December 30, 1982

OPINION NO. 82

David W. Mustoe  
Executive Secretary  
Public School Retirement System of Missouri  
Post Office Box 268  
Jefferson City, Missouri 65102



Dear Dr. Mustoe:

This is in response to your request for an official opinion from this office, which request reads as follows:

1. Can The Public School Retirement System of Missouri allow creditable service for unused sick leave only to those members who are state employees?
2. If the answer to 1. is "yes", must The Public School Retirement System of Missouri use the additional creditable service in calculating the retirement benefits of its members who are state employees?
3. If the unused sick leave is used in the calculation of benefits, can the credit be included within the same period for which a member receives a year of creditable service for actual services?
4. If the unused sick leave credit is extended into the period following the date of last services, can retirement be made effective during that period and benefits paid for the period?

David W. Mustoe

Your questions are answered by the provisions of Section 104.601, RSMo Supp. 1982, which was enacted by House Committee Substitute for House Bills Nos. 1720, 1645 and 1276, 81st General Assembly, Second Regular Session, and became effective on June 1, 1982. Section 104.601 provides as follows:

Any member retiring under the provisions of chapter 104 or any member retiring under the provisions of chapter 169, RSMo, who is a member of the public school retirement system and who is employed by a state agency other than an institution of higher learning, after working continuously until reaching retirement age shall be credited with all his unused sick leave as certified by his employing agency. When calculating years of service, each member shall be entitled to one-twelfth of a year of creditable service for each eighty-four days of unused accumulated sick leave earned by him. The rate of accrual of sick leave for purposes of computing years of service as this act applies to legislative, executive and judicial employees shall be consistent with the rate of accrual as specified by regulations of the personnel advisory board pursuant to section 36.350, RSMo. Nothing under this section shall allow a member to vest in the retirement system by using such credited sick leave to reach the time of vesting.

When statutes are plain and unambiguous, there is no room for construction and they must be applied by the courts as they are written by the legislature. United Airlines, Inc., v. State Tax Commission, 377 S.W.2d 444, 448 (Mo. banc 1964). The word "shall" within a statute indicates a mandate and will usually be interpreted to command the doing of whatever is required. Howard v. Banks, 544 S.W.2d 601, 604 (Mo. App. 1976). Therefore, in response to your first and second questions, it is our view that The Public School Retirement System of Missouri is required under Section 104.601 to allow creditable service for unused sick leave in calculating retirement benefits for those members employed by agencies of the State of Missouri other than institutions of higher learning, and that the provisions of Section 104.601 do not apply to those members who are not employed by a state agency.

In regard to your third and fourth questions, the provisions of Section 104.601 clearly and unambiguously provide that when calculating years of service, each member shall be entitled to one-twelfth of a year of creditable service for each eighty-four days of unused accumulated sick leave earned by him. We find

David W. Mustoe

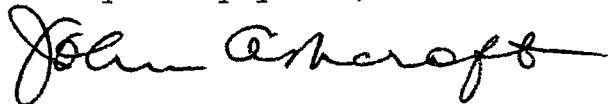
nothing in this statute or in our review of Chapter 169, RSMo, relating to The Public School Retirement System of Missouri, which allows any unused sick leave credit to be extended into the period following the date of last services. Therefore, it is our view that in calculating the retirement benefits for such members, The Public School Retirement System of Missouri is required under Section 104.601 to include any creditable service for unused accumulated sick leave in addition to the creditable service for actual services, and that the allowance of such unused sick leave credit may not be deferred to the period following the date of last services.

#### CONCLUSION

It is the opinion of this office that The Public School Retirement System of Missouri is required under Section 104.601, RSMo Supp. 1982, to allow creditable service for unused sick leave in calculating retirement benefits for those members employed by agencies of the State of Missouri other than institutions of higher learning, but the provisions of that section do not apply to those members who are not employed by a state agency. In calculating the retirement benefits for such members, The Public School Retirement System of Missouri is required under Section 104.601 to include any creditable service for unused accumulated sick leave in addition to the creditable service for actual services, and the allowance of such unused sick leave credit may not be deferred to the period following the date of last services.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, flowing script.

JOHN ASHCROFT  
Attorney General

STATE AUDITOR:  
DEPARTMENT OF REVENUE:  
CONFIDENTIAL RECORDS:  
CONFIDENTIAL INFORMATION:

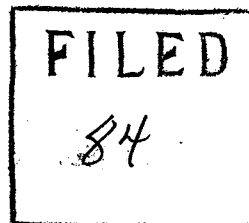
The State Auditor does not have the right to inspect individual income, corporate income, and withholding tax returns, and other documents and information

described in Section 32.057, filed with the Department of Revenue, unless the inspection of such documents is necessary to the proper performance of his constitutional duty to postaudit the accounts of the Department of Revenue or to the proper performance of his constitutional duty to establish appropriate accounting systems for the Department of Revenue.

December 21, 1982

OPINION NO. 84

The Honorable Stan Piekarski  
Representative, District 64  
Chairman, House Select Committee on  
the Department of Revenue  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Piekarski:

This official opinion is in response to your question asking:

Does the state auditor of Missouri have the right of access to individual income, corporate income, and withholding tax returns and other related records held by the Director of the Department of Revenue (1) for auditing purposes? (2) for purposes of establishing an appropriate accounting system for the Department of Revenue?

The duties of the State Auditor are prescribed in Article IV, Section 13, of the Missouri Constitution, as follows:

The state auditor shall have the same qualifications as the governor. He shall establish appropriate systems of accounting for all public officials of the state, post-audit the accounts of all state agencies and audit the treasury at least once annually.

The Honorable Stan Piekarski

He shall make all other audits and investigations required by law, and shall make an annual report to the governor and general assembly. He shall establish appropriate systems of accounting for the political subdivisions of the state, supervise their budgeting systems, and audit their accounts as provided by law. No duty shall be imposed on him by law which is not related to the supervising and auditing of the receipt and expenditure of public funds.

Additionally, there are a number of statutes that speak to the State Auditor's duty and authority to postaudit the accounts of all state agencies and to establish appropriate systems of accounting for all public officials of the state.

Section 29.180, RSMo 1978, provides that:

The state auditor in cooperation with the budget director shall establish appropriate systems of accounting for all officers and agencies of the state, including all educational and eleemosynary institutions, and he shall also prescribe systems of accounting for all county officers. Such systems of accounting shall conform to recognized principles of governmental accounting and shall be uniform in application to offices of the same grade and kind and to accounts of the same kind. Such systems of accounting shall be adequate to record all assets and revenues accrued, all liabilities and expenditures incurred, as well as all cash receipts and disbursements, and all transactions affecting the acquisition and disposition of property, including the preparation and keeping of inventories of all property. Each department shall keep such accounts in accordance with the system of accounts prescribed by the auditor.

Section 29.200, RSMo 1978, states:

The state auditor shall postaudit the accounts of all state agencies and audit the treasury at least once annually. Once every two years, and when he deems it necessary, proper or expedient, the state auditor shall examine and postaudit the accounts of all appointive

The Honorable Stan Piekarski

officers of the state and of institutions supported in whole or in part by the state. He shall audit any executive department or agency of the state upon the request of the governor.

Section 29.235, RSMo 1978, provides that:

1. All audits shall conform to recognized governmental auditing practices.

2. The state auditor and any person appointed by him for that purpose may administer oaths and cause to be summoned before them any person whose testimony is desired or necessary in any examination, and may require the person to produce necessary papers, documents and writings. (Emphasis added.)

Section 29.130, RSMo 1978, states:

The state auditor shall have free access to all offices of this state for the inspection of such books, accounts and papers as concern any of his duties. (Emphasis added.)

The confidentiality of returns, reports and other information received by the Department of Revenue in connection with the administration of the tax laws of this state is established by Section 32.057, RSMo Supp. 1982, which provides in relevant part:

1. Except as otherwise specifically provided by law, it shall be unlawful for the director of revenue, any officer, employee, agent or deputy or former director, officer, employee, agent or deputy of the department of revenue, any person engaged or retained by the department of revenue on an independent contract basis, any person to whom authorized or unauthorized disclosure is made by the department of revenue, or any person who lawfully or unlawfully inspects any report or return filed with the department of revenue or to whom a copy, an abstract or a portion of any report or return is furnished by the department of revenue to make known in any manner, to permit the inspection or use of or to divulge to anyone any information relative to any such report or return, any information obtained by an investigation conducted by the

The Honorable Stan Piekarski

department in the discharge of official duty, or any information received by the director in cooperation with the United States or other states in the enforcement of the revenue laws of this state. Such confidential information is limited to information received by the department in connection with the administration of the tax laws of this state.

2. Nothing herein shall be construed to prohibit:

(1) The disclosure of information, returns, reports, or facts shown thereby, as described in the above subsection 1 of this section, by any officer, clerk or other employee of the department of revenue charged with the custody of such information:

\* \* \*

(c) To the state auditor or his duly authorized employees as required by subsection 4 of this section;

\* \* \*

4. The state auditor or his duly authorized employees who have taken the oath of confidentiality required by section 29.070, RSMo, shall have the right to inspect any report or return filed with the department of revenue if such inspection is related to and for the purpose of auditing the department of revenue; except, that the state auditor or his duly authorized employees shall have no greater right of access to, use and publication of information, audit and related activities with respect to income tax information obtained by the department of revenue pursuant to chapter 143, RSMo, or federal statute than specifically exists under the laws of the United States and of the income tax laws of the state of Missouri. (Emphasis added.)

Any person violating any provision of Section 32.057 shall, upon conviction, be guilty of a class D felony. Section 32.057.3.

The Honorable Stan Piekarski

In Director of Revenue v. State Auditor, 511 S.W.2d 779 (Mo. 1974), the Supreme Court of Missouri held that the State Auditor, in the performance of his constitutional duty to postaudit the accounts of the Department of Revenue, was not entitled to access to individual income, sales, and intangible tax returns in the custody of the Department and which were protected by statute from disclosure by the Department. In so holding, the court found no conflict between (1) the constitutional and statutory provisions relating to the Auditor's duty and authority to postaudit the accounts of the Department of Revenue and (2) former Sections 143.270, 144.120 and 146.090, RSMo 1969, prohibiting the disclosure of individual income, sales, and intangible tax returns in the custody of the Department of Revenue. The court held that access to taxpayers' returns was not necessary to the performance by the State Auditor of his constitutional and statutory duty to postaudit the accounts of the Department of Revenue (see State ex rel. Von Hoffman Press, Inc. v. Saitz, 607 S.W.2d 219, 221 (Mo.App. 1980)), and that access to such documents was properly withheld from the Auditor as provided by former Sections 143.270, 144.120 and 146.090.

Unlike the confidentiality statutes construed in Director of Revenue v. State Auditor, supra, Section 32.057 does not prohibit absolutely the inspection of tax returns or reports filed with the Department of Revenue. Subsection 2(1)(c) expressly authorizes the disclosure of such documents "[t]o the state auditor or his duly authorized employees as required by subsection 4 . . . ." Subsection 4 provides that the State Auditor or his duly authorized employees shall have the right to inspect any report or return filed with the Department of Revenue "if such inspection is related to and for the purpose of auditing the Department of Revenue; . . ."

We do not regard the above-quoted clause in subsection 4 of Section 32.057 as establishing any different criterion by which to determine the State Auditor's right to inspect such documents than the one enunciated by the Supreme Court in Director of Revenue v. State Auditor, supra. We think that case stands for the proposition that access to taxpayers' returns and reports is not necessary to the proper performance of the State Auditor's constitutional and statutory duty to postaudit the accounts of the Department of Revenue. Consequently, it is our view that a proposed inspection of such returns or reports by the State Auditor is not one that is "related to and for the purpose of auditing the Department of Revenue" as provided in subsection 4 of Section 32.057, and that denial of access to such documents is required because of the prohibition against disclosure as provided in subsection 1 of Section 32.057.

With respect to the second part of your question, we observe that subsection 4 of Section 32.057 does not provide for any right

The Honorable Stan Piekarski

of inspection by the State Auditor for any purpose except auditing; it does not purport to authorize any inspection of taxpayers' returns or reports for the purpose of establishing appropriate accounting systems. Therefore, we believe that the answer to the second part of your question requires a determination of whether there is any conflict between (1) the constitutional and statutory provisions prescribing the duty and authority of the State Auditor to establish appropriate accounting systems for all offices and agencies of the state and (2) subsection 1 of Section 32.057 which prohibits absolutely the disclosure of the documents and information described therein.

We are unaware of any Missouri appellate decisions construing those provisions in Article IV, Section 13, of the Missouri Constitution, and in Section 29.180 relating to the duty and authority of the State Auditor to "establish appropriate systems of accounting" for officers and agencies of the state. We considered such provisions at some length in Opinion Nos. 58 and 60 (1976), wherein we stated:

The words used in Article IV, Section 13, are clear and unequivocal. The State Auditor ". . . shall establish appropriate systems of accounting for all public officials of the state, . . ."

The meaning is plain and unequivocal. "Establish" means to set up on a secure or permanent basis. The Oxford English Dictionary (Compact Edition, Oxford University Press, 1971). Therefore, we believe that the people of Missouri in adopting Article IV, Section 13, intended that their State Auditor have the responsibility of designing and requiring the implementation of appropriate systems of accounting for all public officials of the state. We find no constitutional provision granting to any other public official such authority.

\* \* \*

[T]he General Assembly cannot by statute infringe upon the constitutional authority of the State Auditor "to establish appropriate systems of accounting . . ."

We are unable to discern from the information provided in the opinion request whether, or to what extent, the inspection of taxpayer returns and reports is necessary to enable the State Auditor

The Honorable Stan Piekarski

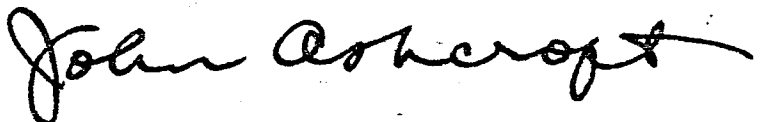
properly to perform his constitutional duty to establish accounting systems for the Department of Revenue. That issue was not raised or addressed in Director of Revenue v. State Auditor, supra. However, we believe that the rationale expressed by the Supreme Court in that case would be similarly applicable to the resolution of any question regarding access by the State Auditor to taxpayer returns or reports for the purpose of establishing appropriate accounting systems for the Department of Revenue.

Therefore, we surmise that notwithstanding the confidentiality provisions in Section 32.057, the State Auditor would have the right to inspect taxpayers' returns and reports filed with the Department of Revenue upon his demonstrating that access to such documents is necessary to the proper performance of his duty to establish appropriate systems of accounting for the Department of Revenue. In the absence of such a showing made by the State Auditor, we believe the confidentiality provisions of Section 32.057 would operate to prohibit such inspection by the State Auditor.

#### CONCLUSION

It is the opinion of this office that the State Auditor does not have the right to inspect individual income, corporate income, and withholding tax returns, and other documents and information described in Section 32.057, filed with the Department of Revenue, unless the inspection of such documents is necessary to the proper performance of his constitutional duty to postaudit the accounts of the Department of Revenue or to the proper performance of his constitutional duty to establish appropriate accounting systems for the Department of Revenue.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, sweeping flourish at the end.

JOHN ASHCROFT  
Attorney General

STATE EMPLOYEES' RETIREMENT SYSTEM:  
LEGISLATORS:

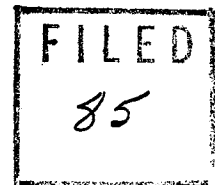
A member of the General  
Assembly is a member of  
the Missouri State Employees'

Retirement System pursuant to the provisions of Sections 104.310(25) and 104.330.1, RSMo Supp. 1982. As such, a member of the General Assembly may serve as an elected member of the board of trustees of the Missouri State Employees' Retirement System pursuant to Section 104.450, RSMo 1978.

November 15, 1982

OPINION NO. 85

The Honorable Don Randall  
Representative, District 8  
4011 Pickett Road  
St. Joseph, Missouri 64503



Dear Representative Randall:

This is in response to your recent request for our opinion on the following question:

May a member of the general assembly serve as an elected member of the board of trustees of the Missouri State Employees' Retirement System, rather than as an appointed member?

Section 104.450, RSMo 1978, which pertains to the Missouri State Employees' Retirement System, provides in pertinent part:

The board of trustees shall consist of the state treasurer, the commissioner of administration, the director of the personnel division, one member of the senate appointed by the president pro tem of the senate, one member of the house of representatives appointed by the speaker of the house, and two members who shall be members of the system and shall be appointed by the governor for four-year terms during the governor's term of office, two members who shall be members of the system and shall be elected by a plurality vote of the members of the system for four-year terms to commence January 1, 1975, and every four years thereafter. . . .

The Honorable Don Randall

This statute requires only that the two elected members of the board of trustees be "members of the system."

Section 104.310, RSMo Supp. 1982, defines "member," as:

(25) "Member", a member of the Missouri state employees' retirement system, without regard to whether or not the member has been retired;

The statutory definition of member does not distinguish between members of the retirement system upon any basis.

Section 104.330.1, RSMo Supp. 1982, establishes the membership of the retirement system, as follows:

As an incident to his contract of employment or continued employment, each employee of the state shall become a member of the system on the first day of the first month following the original effective date of sections 104.310 to 104.540, September 1, 1957, and every person thereafter becoming an employee shall become a member at the time of employment. Each employee's membership shall continue as long as the member continues to be an employee or be on leave for military service or training as hereinafter provided; or receive or be eligible to receive an annuity or benefit.

This statute requires that each employee of the state become a member of the retirement system.

The word "employee" is defined in Section 104.310(20)(a), RSMo Supp. 1982, as:

(20) "Employee":

(a) Any elective or appointive officer or employee of the state who is employed by a department and earns a salary or wage in a position normally requiring the actual performance by him of duties during not less than one thousand five hundred hours per year, including each member of the general assembly,  
... [Emphasis added.]

The Honorable Don Randall

This definition specifically states that each member of the General Assembly is an employee. As state employees for purposes of retirement system law, members of the General Assembly are members of the retirement system under Section 104.330.1, RSMo Supp. 1982, and in the absence of an express disqualification, are eligible to serve as elected members of the board of trustees of the Missouri State Employees' Retirement System.

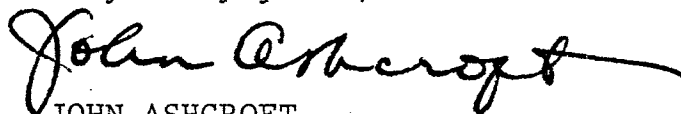
Because your question is somewhat ambiguous, it is necessary to clarify our answer. We believe that if a member of the General Assembly is elected by the members of the Missouri State Employees' Retirement System, he or she serves in addition to the members of the General Assembly appointed pursuant to Section 104.450. Clearly, a member of the General Assembly elected by the members of the system represents system members and not the General Assembly on the board of trustees.

#### CONCLUSION

It is the opinion of this office that a member of the General Assembly is a member of the Missouri State Employees' Retirement System pursuant to the provisions of Sections 104.310(25) and 104.330.1, RSMo Supp. 1982. As such, a member of the General Assembly may serve as an elected member of the board of trustees of the Missouri State Employees' Retirement System pursuant to Section 104.450, RSMo 1978.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Patricia D. Perkins.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a stylized, sweeping flourish at the end.

JOHN ASHCROFT  
Attorney General

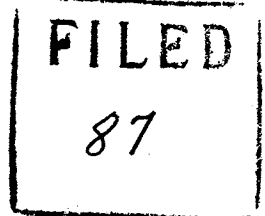
LICENSES:  
PRIVATE WATCHMEN:  
PRIVATE POLICE:  
BOARD OF POLICE COMMISSIONERS:  
ST. LOUIS BOARD OF POLICE  
COMMISSIONERS:

The provisions of Sections 57.117 and 85.005 do not require that a person licensed as a watchman pursuant to Section 84.340 be a resident of the State of Missouri in order to qualify as a licensee.

October 18, 1982

OPINION NO. 87

The Honorable Frank Bild  
Senator, District 15  
7 Meppen Court  
St. Louis, Missouri 63128



Dear Senator Bild:

This is in response to your request for an Attorney General's opinion on the following question:

Under the provisions of RSMo 1978, Sections 85.005 and 57.117 is the City of St. Louis police board mandated by the state to require that watchmen licensed by the City of St. Louis to reside in the State of Missouri?

Section 57.117, RSMo 1978, provides as follows:

Hereafter no sheriff in this state shall appoint any under sheriff or deputy sheriff except the person so appointed shall be, at the time of his appointment, a bona fide resident of the state. (Emphasis added).

Section 85.005, RSMo 1978, provides as follows:

The mayor, chief of police and members of the board of police commissioners of any city in this state shall be governed by the same restrictions and subject to the same penalties as a sheriff of any county, under the provisions of section 57.117, RSMo.

The Honorable Frank Bild

See also Section 542.190, RSMo 1978, to the same effect as Sections 57.117 and 85.005.

The Board of Police Commissioners of the City of St. Louis has the power to regulate and license private watchmen pursuant to Section 84.340, RSMo 1978, which provides as follows:

The police commissioner of the said cities shall have power to regulate and license all private watchmen, private detectives and private policemen, serving or acting as such in said cities, and no person shall act as such private watchman, private detective or private policeman in said cities without first having obtained the written license of the president or acting president of said police commissioners of the said cities, under pain of being guilty of a misdemeanor. (Emphasis added).

We believe the resolution to your opinion request turns on the language employed by the legislature in Sections 57.117 and 84.340, above cited. More specifically, we must determine whether the verb "appoint" as it appears in Section 57.117 has substantially the same meaning as the verbs "regulate and license" as used in Section 84.340.

We believe the word "appoint" as used in Section 57.117 means to employ or hire for an office or position. See Board of Commissioners of Colfax County v. Department of Public Health, 100 P.2d 222 (N.Mex. 1940). The word "license," as used in Section 84.340, has been defined in Missouri to mean the granting of a special privilege or authority not enjoyed by the class of people to which the licensee belongs to do certain things which without the license would be illegal. See ABC Security Service, Inc. v. Miller, 514 S.W.2d 521 (Mo. 1974).

We are aware of a line of cases in Missouri which holds that a policeman is the legal equivalent of a watchman at common law who possesses the power of arrest now vested in peace officers. See Frank v. Wabash Railroad Company, 295 S.W.2d 16 (Mo. 1956), ABC Security Service, Inc. v. Miller, *supra*; Manson v. Wabash Railroad Company, 338 S.W.2d 54 (Mo. banc 1960). These cases specifically address the question of the scope of authority of a watchman licensed pursuant to Section 84.340. Essentially, however, the question you asked has not been passed upon by an appellate court in this state.

Because we believe that the verb "appoint," as it appears in Section 57.117, has a distinctly different meaning than the verb

The Honorable Frank Bild

"license" as it appears in Section 84.340, we do not believe the requirements of Section 57.117 apply to watchmen licensed pursuant to Section 84.340. Clearly, the licensing of a watchman does not require the Board of Police Commissioners to undertake any of the responsibilities normally associated with an employer-employee relationship. However, by appointing a person to serve as a police officer, the board does assume such a relationship.

It is our opinion that the requirement of the Board of Police Commissioners of the City of St. Louis that an individual be a resident of the State of Missouri in order to be licensed as a watchman is not mandated by the laws of this state.

#### CONCLUSION

It is the opinion of this office that the provisions of Sections 57.117 and 85.005 do not require that a person licensed as a watchman pursuant to Section 84.340 be a resident of the State of Missouri in order to qualify as a licensee.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft".

JOHN ASHCROFT  
Attorney General

August 5, 1982

OPINION LETTER NUMBER 88

Honorable James C. Kirkpatrick  
Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

In response to your letter of July 27, 1982 and pursuant to Section 116.160.2, RSMo Supp. 1981, we have prepared the following ballot title for a statutory measure proposed by the initiative:

Supplements school and highway funds by additional one cent on dollar sales/use taxes. Reduces property taxes for schools by one half of the additional sales tax revenue received by schools. Amends school aid formula.

Very truly yours,

JOHN ASHCROFT  
Attorney General

COUNTY HOSPITALS:  
COUNTY COURT:  
GENERAL OBLIGATION BONDS:  
REVENUE BONDS:  
BONDS:

The amendment of Section 205.190, RSMo Supp. 1981, by House Bill 1069, Second Regular Session, 81st General Assembly, which provides for the office of treasurer of the county hospital board of

trustees, does not affect the duty of the county treasurer with respect to general obligation bonds issued under Section 205.160, RSMo, but does place the responsibility for funds received from the issuance of revenue bonds and for revenue collected for payment of principal and interest, under Section 205.161, RSMo Supp. 1981, in the treasurer of the county hospital board of trustees.

August 17, 1982

OPINION NO. 90

The Honorable Ralph Uthlaut, Jr.  
Senator, District 23  
Senate Post Office  
Jefferson City, Missouri 65101



Dear Senator Uthlaut:

This opinion is in response to your questions asking:

HB 1069 passed by the second session of the Missouri General Assembly in 1982 amended chapter 205 RSMo by authorizing county hospital boards of trustees to elect from its members its own treasurer. Previously, the treasurer of the county court served as treasurer of the county hospital, having no vote on the board. HB 1069 becomes effective August 13, 1982.

County courts pursuant to section 205.160 have the authority to issue general obligation bonds and use the proceeds to build hospital facilities. Under the new amendment authorizing a county hospital board to elect its own treasurer, does responsibility and control over the general obligation bonds and related funds transfer to the new treasurer elected by the hospital board of trustees; or is the county treasurer required to retain responsibility and control over the funds and bonds since it is the county court which has the authority to issue the bonds?

The Honorable Ralph Uthlaut, Jr.

Would the answer to this question be different in the case of issuance of revenue bonds by the county court pursuant to section 205.161 RSMo?

House Bill No. 1069, Second Regular Session, 81st General Assembly, effective August 13, 1982, amended Section 205.190, RSMo Supp. 1981, as well as other statutes not relevant here.

The amendment to Section 205.190 added provisions relating to the office of hospital treasurer. Subsection 1 of Section 205.190 provides that the board of hospital trustees elect one of its members as treasurer. Subsection 3 of Section 205.190 provides that the board may require a bond of the treasurer. It further provides that "all moneys received for such hospital shall be credited to the hospital and deposited into the depository thereof for the sole use of such hospital in accordance with the provisions of sections 205.160 to 205.340", and that "[a]ll funds received by each such hospital shall be paid out only upon warrants ordered drawn by the treasurer of the board of trustees of said hospital upon the properly authenticated vouchers of the hospital board."

Section 205.160, RSMo, provides:

The county courts of the several counties of this state are hereby authorized, as provided in sections 205.160 to 205.340, to establish, construct, equip, improve, extend, repair and maintain public hospitals, and may issue bonds therefor as authorized by the general law governing the incurring of indebtedness by counties.

The statutory law governing the issuance of general obligation bonds is contained in Sections 108.010, et seq., RSMo. Section 108.110, RSMo, provides:

The moneys derived from the sale of such bonds shall be deposited in the county treasury, and the county clerk shall charge the treasurer therewith. And the said moneys shall be drawn from the treasury upon the order of the court for the purposes for which the bonds were issued.

Further, it seems clear that the provisions of Section 108.180, RSMo, which require a separate fund for the proceeds from the sale of general obligation bonds and all moneys derived from the tax levy for interest and sinking fund for the payment of the bonds, refer to the county treasury.

The Honorable Ralph Uthlaut, Jr.

Insofar as general obligation bonds are concerned, the amendment to Section 205.190 has not changed the duty of the county treasurer with respect to such general obligation bonds. Therefore, in answer to your first question, when general obligation bonds are issued by the county court pursuant to Section 205.160 the county treasurer has the responsibility for the funds relating to such bonds.

Your second question asks whether the answer would be different in the case of revenue bonds issued by the county court pursuant to Section 205.161, RSMo Supp. 1981.

Section 205.161, RSMo Supp. 1981, provides:

1. In addition to the bonds authorized by section 205.160, the county court in any county exercising the rights conferred by sections 205.160 to 205.340 may issue and sell revenue bonds for the purpose of providing funds for the acquisition, construction, equipment, improvement, extension and repair, and furnishing of hospitals and related facilities, including medical office buildings to provide offices for rental to physicians or dentists on a hospital's medical staff, and the providing of sites therefor, including off-street parking space for motor vehicles. Such revenue bonds shall be payable, both as to principal and interest, solely from the net income and revenues arising from the operation of the hospital or the related facility or facilities, or of the hospital and the related facility or facilities, after providing for the costs of operation and maintenance thereof, or from other funds made available from sources other than from proceeds of taxation.

2. Any bonds issued under the provisions of sections 205.161 to 205.169 shall not be deemed to be an indebtedness of the state of Missouri, or of any county, or of the board of trustees of any such hospital, or of the individual members of any such board of trustees, and shall not be deemed to be an indebtedness within the meaning of any constitutional or statutory limitation upon the incurring of indebtedness. (Emphasis added.)

The Honorable Ralph Uthlaut, Jr.

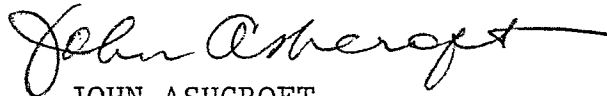
Under Section 205.161 revenue bonds are payable both as to principal and interest from the net income and revenues arising from the operation of the hospital or the related facility or facilities, or of the hospital and the related facility or facilities, after providing for the cost of operation and maintenance thereof. The effect of the amendment to Section 205.190 is to place the responsibility for the revenue bond funds in the treasurer of the county hospital board of trustees instead of the county treasurer.

#### CONCLUSION

It is the opinion of this office that the amendment of Section 205.190, RSMo Supp. 1981, by House Bill 1069, Second Regular Session, 81st General Assembly, which provides for the office of treasurer of the county hospital board of trustees, does not affect the duty of the county treasurer with respect to general obligation bonds issued under Section 205.160, RSMo, but does place the responsibility for funds received from the issuance of revenue bonds and for revenue collected for payment of principal and interest, under Section 205.161, RSMo Supp. 1981, in the treasurer of the county hospital board of trustees.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT  
Attorney General

STATE EMPLOYEES' RETIREMENT SYSTEM:  
RETIRED STATE EMPLOYEES:  
MEDICAL CARE PLAN:

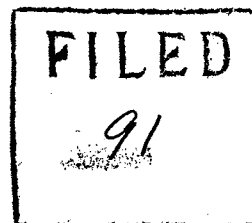
Section 104.515.12,  
RSMo Supp. 1982,  
provides that the  
state shall contrib-

ute \$1.50 per month to the Missouri State Medical Care Plan for each individual employed as a special consultant by the Board of Trustees of the Missouri State Employees' Retirement System.

December 2, 1982

OPINION NO. 91

Mary-Jean Hackwood  
Executive Secretary  
Missouri State Employees' Retirement System  
900 Leslie Boulevard  
Jefferson City, Missouri 65102



Dear Ms. Hackwood:

This opinion is in response to your request which states:

Section 104.515(12) provides that the State will contribute \$1.50 to the Missouri State Medical Care Plan per individual employed as a special consultant by the Board of Trustees of the Missouri State Employees' Retirement System. The statute, however, does not indicate the frequency of the \$1.50 contribution.

Subsection 12 of Section 104.515, RSMo Supp. 1982, became effective June 1, 1982. It provides that:

Each special consultant employed by a board of trustees of a retirement system as provided in section 104.610 who is a member of the Missouri state medical plan or Missouri state highway department and Missouri state highway patrol medical and life insurance plan, shall, in addition to duties prescribed in section 104.610 or any other law, and upon request of the board of trustees, give the board, orally or in writing, a short detailed statement on physical, medical and health problems affecting retirees. As compensation for the extra duty imposed by this subsection, each such special consultant shall receive, in addition to all other compensation provided by law, the sum of one dollar fifty cents contributed toward hospital, surgical and medical insurance benefits.

The basic rule of statutory construction is first to seek the intention of the lawmakers and, if possible, to effectuate that intention. State v. Carter, 319 S.W.2d 596, 599 (Mo. banc 1958). In determining the intent and meaning of the statute, the words used in the statute must be considered in their context and sections of the statutes in pari materia, as well as cognate sections, must be considered in order to arrive at the true meaning and scope of the words. Id. at 600. See also Eureka Fire Protection District v. Hoene, 623 S.W.2d 79, 83 (Mo.App. 1981) [one section of a statute must be read in pari materia with other related provisions]. Accord, State ex rel. Ashcroft v. Union Electric Company, 559 S.W.2d 216, 221 (Mo.App. 1977).

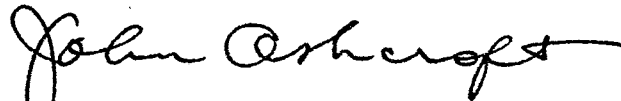
In addition, the legislature is presumed to intend logical and reasonable results, and it is further presumed that the legislature did not intend unreasonable consequences. See Wilson v. McNeal, 575 S.W.2d 802, 811 (Mo.App. 1978). Words are not to be supplied, inserted or read into a statute unless there is an omission plainly indicated and unless the statute as written is incongruous, unintelligible, or leads to absurd results. State ex rel. May Department Stores Company v. Weinstein, 395 S.W.2d 525, 527 (Mo.App. 1965).

Considering these basic canons of statutory construction, we are of the opinion that the legislature intended the contribution mentioned in Section 104.515.12 be made monthly. We believe that the words "per month" were inadvertently omitted from the statute. Inclusion of these words is necessary to render the statute logical and consistent. In addition, another section of the statute in question refers to a similar contribution by the state as a "per month per employee" contribution. See Section 104.515.5.

#### CONCLUSION

It is the opinion of this office that Section 104.515.12, RSMo Supp. 1982, provides that the state shall contribute \$1.50 per month to the Missouri State Medical Care Plan for each individual employed as a special consultant by the Board of Trustees of the Missouri State Employees' Retirement System.

Very truly yours,



JOHN ASHCROFT  
Attorney General

*Attorney General of Missouri*

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT  
ATTORNEY GENERAL

(314) 751-3321

August 25, 1982

OPINION LETTER NO. 92  
(Amended)

The Honorable Leary G. Skinner  
County Counselor  
Clay County  
17 West Kansas  
Liberty, Missouri 64068

Dear Mr. Skinner:

This is in response to your request for an opinion which asks whether a mortgage lender may charge points on a residential real estate loan which it intends to resell to Clay County pursuant to the provisions of Section 108.450.1(1) or (3), RSMo Supp. 1981.

Sections 108.450 to 108.475, RSMo Supp. 1981, entitled "County Housing Bonds" (hereafter referred to as "the Act"), authorize a county or combination of counties to issue and sell revenue bonds "[i]n order to aid in providing an adequate supply of residential housing for low or moderate income persons or families. . . ." Section 108.450.1. The Act authorizes the county to use the proceeds of such sale for purposes outlined in Section 108.450.1(1)-(4). Under the Act, the county governing authority may determine such features of the bonds as their rate of interest (not to exceed fourteen percent per annum), the maturity of the bonds (not to exceed thirty-five years), provisions relating to redemption before maturity, and the allowable discount (not less than ninety-four percent of principal amount). Section 108.455.1.

Section 408.052.1, RSMo Supp. 1981, provides:

No lender shall charge, require or receive, on any residential real estate loan, any points or other fees of any nature whatsoever, excepting insurance and a one percent origination fee, whether from the buyer or the seller or any other person, except that the lender may charge bona fide expenses paid by the lender to any

The Honorable Leary G. Skinner

other person or entity except to an officer, employee, or director of the lender or to any business in which any officer, employee or director of the lender owns any substantial interest for services actually performed in connection with a loan. In addition to the foregoing, if the loan is for the construction, repair, or improvement of residential real estate, the lender may charge a fee not to exceed one percent of the loan amount for inspection and disbursement of the proceeds of the loan to third parties. The restrictions of this section shall not apply . . . (2) to any loan for which an offer or commitment or agreement to purchase has been received from and which is made with the intention of reselling such loan to the Federal Housing Administration, Farmers Home Administration, Federal National Mortgage Association, Government National Mortgage Association, Federal Home Loan Mortgage Corporation, or to any successor thereof, to any other state or federal governmental or quasi-governmental organization. Any points or fees received in excess of those permitted under this section shall be returned to the person from whom received upon demand. [Emphasis added.]

Section 408.052.1 provides that the prohibition against charging points does not apply when a loan is made with the intention of "reselling such loan . . . to any . . . state . . . governmental . . . organization." Article VI, Section 1, Missouri Constitution, provides: "The existing counties are hereby recognized as legal subdivisions of the state." Counties are territorial subdivisions of the state created by the legislature for public purposes. Clark v. Adair County, 79 Mo. 536 (1883).

We believe Clay County is a state governmental organization as that phrase is used in Section 408.052.1. Therefore, we believe that a mortgage lender may charge points on a residential real estate loan which it intends to resell to Clay County pursuant to the provisions of Sections 108.450.1(1) or (3), RSMo Supp. 1981.

Very truly yours,



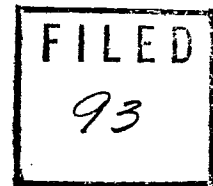
JOHN ASHCROFT  
Attorney General

CLAY COUNTY: Representation of Clay County on the  
COUNTY COMMITTEE: senatorial district committees for  
POLITICAL COMMITTEES: districts 12 and 17 is governed by  
SENATORIAL DISTRICTS: Section 115.619.4, and the phrase  
"ward or township" as used in that  
section includes a "committee district" established in Clay County  
pursuant to Section 115.607.4.

August 25, 1982

OPINION NO. 93

The Honorable David L. Steelman  
Representative, District 129  
Room 204, State Capitol Building  
Jefferson City, Missouri 65101



Dear Representative Steelman:

This opinion is issued in response to your question regarding representation of Clay County on the senatorial district committees for senatorial districts numbered 12 and 17, both of which include a part of Clay County.

The composition of senatorial district committees in districts which are composed of a part of a county is governed by subsection 4 of Section 115.619, RSMo 1978, which states:

The congressional, senatorial or judicial district committee of a district which shall be composed in whole or in part of a part of a city or part of a county shall include as members of such committee the ward or township committeemen and committeewomen from such wards or townships included in whole or in part in such part of a city or part of a county forming the whole or a part of such district.

However, the members of the county political committees in Clay County are not elected from wards or townships; they are elected from committee districts in accordance with Section 115.607, RSMo 1978, as amended by House Committee Substitute for Senate Bill No. 526, 81st General Assembly. That section provides in relevant part:

The Honorable David L. Steelman

1. No person shall be elected or shall serve as a member of a county committee who is not, for one year next before his election, both a registered voter of and a resident of the county and the committee district from which he is elected. Except as provided in subsections 2, 3, 4 and 5 of this section, the membership of a county committee of each established political party shall consist of a man and a woman elected from each township or ward in the county.

\* \* \*

4. In each county of the first class containing a portion, but not the major portion, of a city which has over three hundred thousand inhabitants, ten members of the committee, five men and five women, shall be elected from the district of each state representative wholly contained in the county in the following manner: After each legislative reapportionment, the election authority shall divide each legislative district wholly contained in the county into five committee districts of contiguous territory as compact and nearly equal in population as may be; two members of the committee, a man and a woman, shall be elected from each committee district. The election authority shall divide the area of the county located within legislative districts not wholly contained in the county into similar committee districts; two members of the committee, a man and a woman, shall be elected from each committee district. [emphasis added]

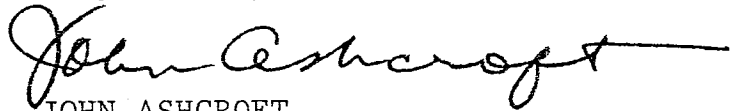
Although subsection 4 of Section 115.619 does not explicitly state that the senatorial district committees shall include committeemen and committeewomen who are elected from committee districts (instead of from wards or townships), we are unwilling to ascribe to the General Assembly an intent to deprive Clay County of representation on the senatorial district committees for those districts which contain a part of that county. Accordingly, we believe that the reference to "ward or township" appearing in Section 115.619.4 must be construed to mean "committee district" in relation to Clay County, whose county political committees are elected from committee districts pursuant to Section 115.607.4.

The Honorable David L. Steelman

CONCLUSION

It is the opinion of this office that representation of Clay County on the senatorial district committees for districts 12 and 17 is governed by Section 115.619.4, and that the phrase "ward or township" as used in that section includes a "committee district" established in Clay County pursuant to Section 115.607.4.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT  
Attorney General

*Attorney General of Missouri*

POST OFFICE BOX 899

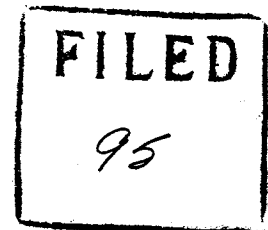
JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT  
ATTORNEY GENERAL

(314) 751-3321

September 10, 1982

OPINION LETTER NO. 95



Honorable James C. Kirkpatrick  
Secretary of State  
State Capitol Building  
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:

In response to your letter of August 31, 1982 and pursuant to Section 116.160.2, RSMo Supp. 1981, we have prepared the following ballot title for a statutory measure proposed by the initiative:

Authorizes creation of consumers' utility organizations to represent utility consumers' interests in certain Public Service Commission proceedings and on appeal. Requires certain utilities to collect voluntary membership dues and mail materials for such consumers' organizations.

Very truly yours,

JOHN ASHCROFT  
Attorney General

ARRESTS:  
CITIES, TOWNS AND VILLAGES:  
POLICE:  
POLICE RECORDS:  
SUNSHINE LAW:  
RECORDS:

A municipality in a first class county having a charter form of government may transmit arrest records to the county law enforcement agency pursuant to Section 66.200, RSMo 1978, prior to the closing of such arrest records

pursuant to the requirements of Sections 610.100 and 610.105, RSMo Supp. 1982. A municipality in a first class county having a charter form of government may not transmit arrest records to the county law enforcement agency, if prior to the transmittal, the arrest record is closed as required by Sections 610.100 and 610.105, RSMo Supp. 1982.

November 8, 1982

OPINION NO. 96

The Honorable Jack E. Pohrer  
Representative, District 89  
State Capitol Building, Room 204  
Jefferson City, Missouri 65101



Dear Representative Pohrer:

This opinion is in response to your question asking the following:

Do the provisions of Sections 610.100 and 610.105 of the Revised Statutes of Missouri prohibit compliance with Section 66.200 (except for persons arrested and charged within thirty days and subsequently found guilty) or may there be compliance with Section 66.200 within thirty days of an arrest and within the time a case is pending and before it is nolle prossed, dismissed or the Defendant found not guilty.

Section 610.100, RSMo Supp. 1982, states as follows:

If any person is arrested and not charged with an offense against the law within thirty days of his arrest, official records of the ar-

The Honorable Jack E. Pohrer

rest and of any detention or confinement incident thereto shall thereafter be closed records except as provided in section 610.120.

Section 610.105, RSMo Supp. 1982, provides as follows:

If the person arrested is charged but the case is subsequently nolle prossed, dismissed, or the accused is found not guilty or imposition of sentence is suspended in the court in which the action is prosecuted, official records pertaining to the case shall thereafter be closed records when such case is finally terminated except as provided in section 610.120.

Section 66.200, RSMo 1978, provides that police records "pertaining to all violations constituting felonies or misdemeanors punishable by a jail sentence except traffic violations" which are maintained by a municipality in a first class county having a charter form of government "shall be transmitted to the county authority immediately after the information is obtained by the municipal police." [Emphasis added.]

As stated in State v. Kraus, 530 S.W.2d (Mo. banc 1975):

[t]he primary rule of statutory construction is to ascertain the intent of the lawmakers from the language used, to give effect to that intent if possible, and to consider words used in a statute in their plain and ordinary meaning. [citation omitted]. Id. at 685.

Sections 610.100 and 610.105 expressly provide that records of an arrest where the arrestee is not charged with an offense within thirty days or where such prosecution is terminated by nolle prosequi, dismissal, acquittal or suspended imposition of sentence "shall thereafter be closed records . . ." [Emphasis added.]

The clear significance and intent of the word "thereafter" as used in the statutes is that the records in question are not closed until such time as one of these specified conditions are met. Thus, a municipality may transmit arrest records to the county law enforcement agency prior to those records becoming closed. However, once such arrest records are closed, they may be revealed "only to courts, administrative agencies, and law enforcement agencies for purposes of prosecution, litigation, sentencing, and parole consideration." Section 610.120, RSMo Supp. 1982.

The Honorable Jack E. Pohrer

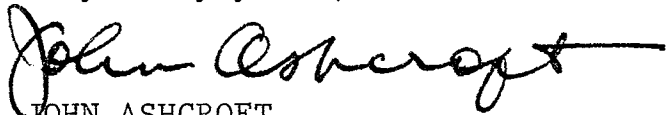
We further believe that the duty to close arrest records pursuant to Sections 610.100 and 610.105 and thus protect those records from general public scrutiny extends to law enforcement agencies which both create and receive such records prior to their becoming closed records. By requiring transmittal of the final disposition of all violations to the county agency, Section 66.200 provides a procedure for assuring that the purposes of Sections 610.100 and 610.105 are met.

#### CONCLUSION

It is the opinion of this office that a municipality in a first class county having a charter form of government may transmit arrest records to the county law enforcement agency pursuant to Section 66.200, RSMo 1978, prior to the closing of such arrest records pursuant to the requirements of Sections 610.100 and 610.105, RSMo Supp. 1982. A municipality in a first class county having a charter form of government may not transmit arrest records to the county law enforcement agency if, prior to the transmittal, the arrest record is closed as required by Sections 610.100 and 610.105, RSMo Supp. 1982.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John M. Morris.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT  
Attorney General

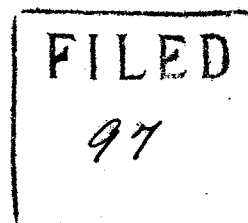
ELECTION EXPENSE:  
ELECTIONS:  
SECRETARY OF STATE:  
OFFICE OF ADMINISTRATION:  
COSTS OF ELECTIONS:  
COMMISSIONER OF ADMINISTRATION:

The Commissioner of Administration is responsible for the administration of the State Election Subsidy Fund, established pursuant to Section 115.077.5, RSMo Supp. 1982.

December 10, 1982

OPINION NO. 97

The Honorable James C. Kirkpatrick  
Secretary of State  
State Capitol Building, Room 209  
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This opinion is in response to your question asking who is responsible for the administration of the "State Election Subsidy Fund," Subsection 5 of Section 115.077, RSMo Supp. 1982.

Subsection 5 of Section 115.077, RSMo Supp. 1982, provides as follows:

There is hereby created the "State Election Subsidy Fund" in the state treasury which shall be funded by appropriations from the general assembly for the purpose of the state making advance payments of election costs as required by this section.

We are unable to find any express provision in the laws of Missouri which places the responsibility for the administration of the State Election Subsidy Fund in any particular officer or agency.

Under the provisions of Section 37.010.4, RSMo 1978, the Commissioner of Administration "shall provide the governor with such assistance in the supervision of the executive branch of state government as the governor requires . . . ." Claims against the state are required to be made to the Commissioner of Administration pursuant to Section 33.120, RSMo 1978, within two years after such claims accrue. Under Section 115.061.2, RSMo 1978, the Commissioner

The Honorable James C. Kirkpatrick

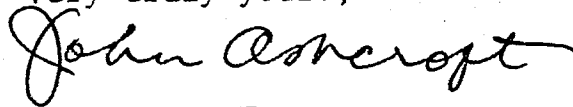
of Administration audits claims made against the state under that section of the election law.

Therefore, we believe that the administration of the State Election Subsidy Fund is properly the responsibility of the Commissioner of Administration as part of his duties to assist the governor in the supervision of the executive branch of government (Section 33.010.4). See also Sections 33.030(2) and (3), and 33.060, RSMo.

#### CONCLUSION

It is the opinion of this office that the Commissioner of Administration is responsible for the administration of the State Election Subsidy Fund, established pursuant to Section 115.077.5, RSMo Supp. 1982.

Very truly yours,

A handwritten signature in cursive script that reads "John Ashcroft". The signature is written in dark ink and is positioned above the printed name and title.

JOHN ASHCROFT  
Attorney General

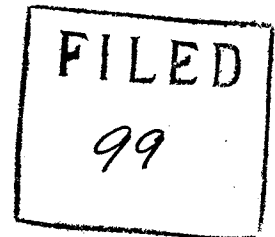
COMMISSIONER OF ADMINISTRATION:  
OFFICE OF ADMINISTRATION:  
STATE EMPLOYEES' RETIREMENT SYSTEM:

State Travel Regulations,  
1 CSR 10-11.010, do not  
apply to the employees of  
the Missouri State Employees'  
Retirement System.

December 20, 1982

OPINION NO. 99

The Honorable James F. Antonio, CPA  
State Auditor  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Dr. Antonio:

This is in response to your request for an opinion as follows:

Do the State Travel Regulations, 1 CSR  
10-11.010, apply to the employees of the  
Missouri State Employees' Retirement System.  
[MOSERS]?

Section 33.090, RSMo 1978, provides:

The commissioner of administration shall  
be empowered to promulgate rules and regula-  
tions governing the incurring and payment of  
reasonable and necessary travel and subsistence  
expenses actually incurred on behalf of the  
state.

Section 104.470.4, RSMo Supp. 1982, provides:

Employees of the system shall receive  
such salaries as shall be fixed by the board  
and their necessary travel expense within and  
without the state as shall be authorized by  
the board.

In rendering this opinion, we are mindful of State ex rel.  
Danforth v. Riley, 499 S.W.2d 40 (Mo.App. 1973), in which the  
Western District Court of Appeals stated in dicta that regulations  
promulgated pursuant to Section 33.090 were " 'legislative' rules

The Honorable James F. Antonio, CPA

and should be accorded the force and effect of laws. . . ." Id. at 44. Therefore, for purposes of this opinion, we will accord the regulations of the Commissioner of Administration found at 1 CSR 10-11.010 the force of law.

The rules of statutory construction adopted by the courts of this state require us to seek the intent of the legislature in rendering this opinion. City of Willow Springs v. Missouri State Librarian, 596 S.W.2d 441 (Mo. banc 1980). We must assume that the legislature acts with full knowledge of the subject matter and existing law. Bushell v. Schepp, 613 S.W.2d 689 (Mo.App. 1981). Finally, the courts direct that general and special statutes dealing with the same subject are to be harmonized if possible; but to the extent of any disagreement between general and special statutes, the special statute prevails, and if passed later, is an exception to the prior, general statute. Laughlin v. Forgrave, 432 S.W.2d 308 (Mo. banc 1968); State ex rel. McKittrick v. Carolene Products Co., 144 S.W.2d 153 (Mo. banc 1940); City of Raytown v. Danforth, 560 S.W.2d 846 (Mo. banc 1977).

Section 33.090 was first passed in 1945 by the General Assembly and was amended in 1977 to recognize the reorganization of the executive branch. Regulations promulgated pursuant to Section 33.090 were last amended in 1979. Section 104.470 first became law in 1957 and was last amended in 1981.

We believe that the General Assembly was aware of the existence of both Section 33.090 when it first passed Section 104.470 in 1957, and of 1 CSR 10-11.010, when it last addressed Section 104.470. Therefore, we are of the opinion that Section 104.470.4, which specifically authorizes the MOSERS Board of Trustees to authorize travel by MOSERS employees, is an exception to the general travel regulations contained in 1 CSR 10-11.010.

This conclusion is supported on two additional grounds. First, 1 CSR 10-11.010(17) (with exceptions not germane here) requires the Office of Administration to approve out-of-state travel prior to that travel taking place. Section 104.470.4 provides that necessary travel expense incurred by MOSERS employees for out-of-state travel are compensable "as shall be authorized by the board." To place MOSER employees under Section 33.090 constraints would be to require a dual authorization--a redundancy not intended by the legislature.

Second, the duties of MOSERS employees are highly complex and technical, requiring familiarity with the intricacies of the financial world and an ability to react quickly to financial events with potential impact on the system. The maintenance of such

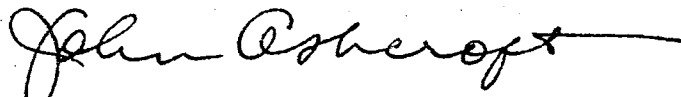
The Honorable James F. Antonio, CPA

familiarity and the preservation of a working relationship with members of the financial community require MOSERS employees to have flexibility to travel as needs arise. We believe that the General Assembly acknowledged the realities of MOSERS management needs by its passage of Section 104.470.4 and intended that MOSERS employees be an exception to Section 33.090 and 1 CSR 10-11.010. Clearly, the MOSERS Board of Trustees is in the best position to determine the proper limits of travel expenses for MOSERS employees.

CONCLUSION

It is the opinion of this office that State Travel Regulations, 1 CSR 10-11.010, do not apply to the employees of the Missouri State Employees' Retirement System.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT  
Attorney General

FIRE PROTECTION DISTRICTS:  
HANCOCK AMENDMENT:  
TAXATION:

Upon consolidation of two existing fire protection districts pursuant to Section 321.460, RSMo 1978, the consolidated dis-

trict may levy as a matter of right only those taxes which had been previously approved by the voters of both of the former fire protection districts prior to consolidation.

December 20, 1982

OPINION NO. 102

The Honorable Jack Goldman  
Representative, District 102  
8507 Elsa Avenue  
St. Louis, Missouri 63123

FILED

102

Dear Representative Goldman:

This opinion is in response to your request concerning the tax rate which may be levied by a newly formed consolidated fire protection district formed in accordance with the provisions of Section 321.460, RSMo 1978. In your request you pose two questions, the first of which is stated as follows:

"If two fire districts are merged together pursuant to the statutory scheme in Chapter 321 and if both districts previously had voter authorization to levy supplemental property tax rates for a total of 65¢ for operating purposes; 15¢ for ambulance purposes; and 5¢ for pension purposes; is the authorization to levy such taxes a 'right' of the district to which the newly consolidated district succeeds? Can the newly consolidated district levy a property tax of 85¢ per \$100.00 valuation without the necessity of returning to the voters for approval of such a levy?"

Your second question is:

Assume that two districts are consolidated into a new fire protection district. District "A", prior to the consolidation, had authority to levy a 65¢ operating levy, a 15¢ ambulance

The Honorable Jack Goldman

levy, and a 5¢ pension levy. District "B" had authority to levy only a 65¢ operating levy and a 5¢ pension levy. In the event of consolidation, if the consolidated district has the "right" to levy those taxes previously approved by the voters of the "several" districts which became the subject of the consolidation, may the consolidated district levy the highest tax rate approved by either district prior to the consolidation or may it levy only those taxes which had been previously approved by the voters by each of the fire protection districts prior to consolidation?

Section 321.465, RSMo 1978, provides in pertinent part that "[a]ll properties, rights, assets, and liabilities of the several fire protection districts which are so consolidated, including outstanding bonds thereof if any, shall become forthwith and without any further procedure the properties, rights, assets, and liabilities of the consolidated fire protection district." Where, as in your first question, both districts had already authorized by majority vote an identical rate of levy, it seems clear that an existing "right" has been established which may be exercised by the new consolidated district without further voter approval. However, where differing levies have been established, as in your second question, the authority to impose a higher levy on that portion of the new consolidated district which had not before voted for such a levy is questionable. In making this statement, we are mindful of the public policy of this state, as expressed in the Hancock Amendment, Article X, Section 22, Missouri Constitution, that taxes imposed by a county or political subdivision in this state not be increased without a vote of the people.

Although approval by the voters in the proposed consolidated district is required before consolidation can take effect (Section 321.460.8, RSMo 1978), the question as submitted to the voters pursuant to Section 321.460.7 does not establish the effective levy to be imposed in the consolidated district. Absent the express approval of the majority of the voters of the proposed consolidated district, we believe that a levy may not be imposed by the consolidated district simply because it has been approved by the majority of the voters in one of the districts prior to consolidation. To do so would be to impose an additional tax upon property lying within the boundaries of one of the former districts which had not been approved by a majority of the voters therein.

The Honorable Jack Goldman

Furthermore we believe that the levy imposed by the consolidated district must be uniform upon all property lying within its boundaries. See Article X, Section 3 of the Missouri Constitution. Therefore, in the absence of approval by a majority of the voters in the consolidated district of the new rates, the levy may be set at the highest rate for each tax approved in both of the districts prior to consolidation. Thus, where District "A" is authorized to collect a 65-cent operating levy, a 15-cent ambulance levy and a 10-cent pension levy, and District "B" is authorized to collect a 65-cent operating levy and a 5-cent pension levy, and has no authority to collect an ambulance levy, the consolidated district may collect a 65-cent operating levy and a 5-cent pension levy and no ambulance levy.

#### CONCLUSION

It is the opinion of this office that upon consolidation of two existing fire protection districts pursuant to Section 321.460, RSMo 1978, the consolidated district may levy as a matter of right only those taxes which had been previously approved by the voters of both of the former fire protection districts prior to consolidation.

Very truly yours,



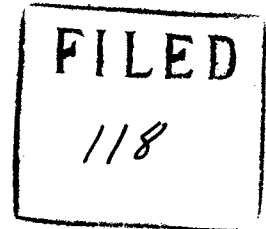
JOHN ASHCROFT  
Attorney General

CHIROPODIST: A chiropodist, podiatrist or  
PODIATRIST: physician of the foot, under  
PHYSICIAN OF THE FOOT: Section 330.010.2, RSMo 1978,  
may perform surgical treatment  
of the ailments of the human foot when a general anesthetic has  
been administered by a person licensed to administer anesthetics.

December 20, 1982

OPINION NO. 118

The Honorable Phil Snowden  
Senator, District 17  
State Capitol Building, Room 427  
Jefferson City, Missouri 65101



Dear Senator Snowden:

This opinion is in response to your request for an official  
opinion on the following question:

Can a podiatrist perform surgery when  
a general anesthetic has been administered?

Section 330.010.2, RSMo 1978, provides in pertinent part:

The definitions of the words "chiropodist"  
and "podiatrist", or "physician of the foot",  
shall for the purpose of this section be held  
to be the diagnosis, medical, physical, or  
surgical treatment of the ailments of the human  
foot, with the exception of administration of  
general anesthetics, or amputation of the foot  
and with the further exception that the defini-  
tions shall not apply to surgery on children  
under the age of one year. The use of such  
drugs and medicines in the treatment of ail-  
ments of the human foot shall not include the  
treatment of any systemic diseases. [Emphasis  
added.]

Section 330.010.2, RSMo 1969, before its amendment in 1976  
provided as follows:

The Honorable Phil Snowden

The definitions of the words "chiroprody" and "podiatry" shall be synonymous and interchangeable and, for the purpose of this chapter, be held to be the local, medical, mechanical or surgical treatments of the ailments of the human foot, and massage in connection therewith. It shall not include amputation of the foot and toes or the use of anesthetics other than local. The use of drugs or medicines shall be limited to the prescription or administration of analgesics, antipyretics, sedatives, fungicides and antibacterials only when specifically indicated for the treatment of ailments of the human foot. The use of such drugs and medicines in the treatment of ailments of the human foot shall not include the treatment of any systemic diseases.

Clearly, the addition of the phrase "with the exception of administration of general anesthetics . . ." has the purpose of prohibiting a podiatrist from administering general anesthetic. We find no statutory language which prohibits a podiatrist from performing surgery on the foot of a patient to whom general anesthesia has been administered by a person authorized to administer such anesthesia. The effect of the amendment to Section 330.010.2 is to limit the exception to the administration of general anesthetics.

The rules of statutory interpretation provide that "[i]t may be presumed that action by the legislature is intended to have some substantive effect", Murphy v. Pemiscot County, 639 S.W.2d 384, 385 (Mo. banc 1982), and that "[t]he legislature will not be charged with having done a meaningless act." State ex rel. Thompson-Stearns-Roger v. Schaffner, 489 S.W.2d 207, 212 (Mo. 1973).

Therefore, it is our view that although a podiatrist may not administer a general anesthetic he may perform surgical treatment of the ailments of the human foot when a general anesthetic has been administered by a person licensed to administer anesthesia.

#### CONCLUSION

It is the opinion of this office that a chiroprodist, podiatrist or physician of the foot, under Section 330.010.2, RSMo 1978, may perform surgical treatment of the ailments of the human foot when a general anesthetic has been administered by a person licensed to administer anesthetics.

The Honorable Phil Snowden

The foregoing opinion, which I hereby approve, was prepared by my assistant, Margaret Keate.

Very truly yours,

A handwritten signature in cursive script, reading "John Ashcroft", with a long horizontal flourish extending to the right.

JOHN ASHCROFT  
Attorney General

HANCOCK AMENDMENT:  
CONSTITUTIONAL LAW:  
COUNTIES:

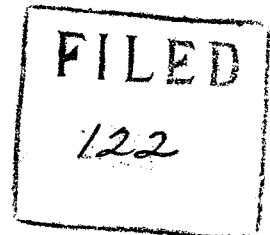
County hospital charges may be increased without voter approval. Such charges do not constitute taxes, licenses or fees within

the meaning of Article X, Section 22 (a) of the Missouri Constitution.

December 14, 1982

OPINION NO. 122

Mr. Carroll G. Leffler  
Johnson County Prosecuting Attorney  
203 North Holden  
Warrensburg, Missouri 64093



Dear Mr. Leffler:

This opinion is in response to your request as follows:

Can new or increased hospital room rates and other hospital charges for a county hospital [established pursuant to Sections 205.160 to 205.379, RSMo] be imposed as necessary to satisfy the rate covenant contained in a proposed resolution of the County Court, to be adopted pursuant to Sections 205.160 to 205.379, RSMo. 1978, authorizing the issuance of revenue bonds for the purpose of acquiring, constructing, improving, extending, repairing, equipping and furnishing an addition to, and renovating existing areas of the county hospital, without obtaining voter approval of the new or increased rates or charges under Article X, §22(a) of the Missouri Constitution?

The facts which you present to support your request indicate that the county court proposes to adopt a resolution authorizing the issuance of revenue bonds pursuant to Sections 205.160 to 205.379, RSMo, which authorize a county court to issue and sell revenue bonds "for the purposes of providing funds for the acquisition, construction, equipment, improvement, extension and repair, and furnishing of hospital and related facilities, and of providing a site therefor, including offstreet parking space for motor vehicles. . . ." Section 205.161.1, RSMo Supp. 1982. No voter

Mr. Carroll G. Leffler

approval is required for issuance of such bonds. The bonds do not constitute an indebtedness of the State of Missouri, of the county or of the board of trustees of the county hospital, nor are they deemed an indebtedness within the meaning of any constitutional or statutory limitation upon the incurring of indebtedness. See Section 205.161, RSMo Supp. 1982.

Under Section 205.161, the bonds are payable both as to principal and interest solely from the net income and revenues arising from the operation of the hospital, after providing for the cost of operation and maintenance thereof, or from other funds made available from sources other than from proceeds of taxation. Bondholders who purchase the bonds are secured by the revenues of the hospital and may not look to the county, to county taxpayers or to the board of trustees for payment of the bonds.

To make these revenue bonds marketable, it is necessary that bond purchasers be assured that revenues of the bond-financed hospital facility will be sufficient to operate and maintain the facility and to pay the principal of and interest on the bonds. To this end, we understand that the proposed resolution of the county court authorizing and directing the issuance of these bonds, contains a covenant by the county and the county hospital board of trustees to raise rates as necessary to operate and maintain the hospital facility and to pay the principal and interest on the bonds. The proposed resolution will also be approved by the board of trustees of the county hospital which is vested with extensive powers relating to "the government of the hospital" by Sections 205.170 to 205.195, RSMo.

Article X, Section 22(a), Missouri Constitution, provides:

Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon.  
... [Emphasis added.]

The primary issue to be determined in answering your question is whether hospital charges imposed for hospital and medical services constitute a "tax, license or fees" subject to Article X, Section 22(a).

Mr. Carroll G. Leffler

The meaning of the phrase "tax, license or fees" was recently addressed by the Missouri Supreme Court in Roberts v. McNary, 636 S.W.2d 332, 335 (Mo. banc 1982). The court stated:

Article X, § 22(a) prohibits counties from levying any tax, license or fee not then authorized and from increasing any existing tax, license or fee. Webster's Third New International Dictionary (1965) defines these words as follows: (1) tax--"a pecuniary charge imposed by legislative or other public authority upon persons or property for public purposes: a forced contribution of wealth to meet the public needs of a government"; (2) license--"a right or permission granted in accordance with law by a competent authority to engage in some business or occupation, to do some act, or to engage in some transaction which but for such license would be unlawful"; (3) fee--"a fixed charge for admission; a charge fixed by law or by an institution for certain privileges or services; a charge fixed by law for services of a public officer."

This Court has recently spoken on two of these words:

"The term 'tax' has been defined variously, but the appropriate definition for us is found in Leggett v. Missouri State Life Ins. Co., 342 S.W.2d 833, 875 (Mo. banc 1960) in which we stated: 'Taxes are "proportional contributions imposed by the state upon individuals for the support of government and for all public need." \* \* \* Taxes are not payments for a special privilege or a special service rendered \* \* \* Fees or charges prescribed by law to be paid by certain individuals to public officers for services rendered in connection with a specific purpose ordinarily are not taxes \* \* \* unless the object of the requirement is to raise revenue to be paid into the general fund of the government to defray customary governmental expenditures \* \* \* rather than compensation of public officers for particular services rendered. \* \* \*'"

Mr. Carroll G. Leffler

Craig v. City of Macon, 543 S.W.2d 772, 774  
(Mo. banc 1976).

The court concluded:

Reading the words examined here for their ordinary and customary meanings, they present a sweeping list of the types of pecuniary charges the government makes. Quite simply, this exhibits an intent to control any such charges to the extent that the voters must approve any increase in them. [Emphasis added.]

Thus the Missouri Supreme Court in the Roberts case gave a very broad reading to the phrase "tax, license or fees." We lament that the court's holding in Roberts does not dispose of the question presented here. However, a careful reading of Roberts and Craig and a review of the types of charges that political subdivisions make suggests that some construction of the phrase "tax, license or fees" is necessary to determine which charges collected by a political subdivision are fees covered by Article X, Section 22(a) of the Missouri Constitution and which are not subject to the amendment's provisions.

It is clear that the touchstone of construction of Article X, Section 22(a) is to give the words of this provision the meaning intended by the voters, which in the absence of contrary evidence is their plain, natural and ordinary meaning. A construction of a constitutional provision should never be adopted which results in the requirement of useless or absurd acts, except where its terms are positive and unavoidable, State ex rel. Howell-Shapleigh Hardware Co. v. Cook, 77 S.W. 559 (Mo. Supp. 1904); cf. Oswald v. City of Blue Springs, 635 S.W.2d 332 (Mo. banc 1982). The question then is what the voters intended. Did the voters intend that every charge or monetary exaction collected by a county or other political subdivision be subject to their approval?

The language of Section 22(a) reflects the voter's intent to require voter approval of only certain charges collected by a political subdivision. If the voters intended to include all charges collected by a county or political subdivision in the prescription of Section 22(a), the language of that provision easily could have been written to express this intent. Instead, the language of Section 22(a) singles out only certain charges, those constituting a "tax, license or fees," which must be submitted to a voter referendum.

Mr. Carroll G. Leffler

Clearly, the policy behind Section 22(a) is not served by applying its limitations to all charges collected by a political subdivision. The Missouri Supreme Court in Roberts concluded that the purpose behind Section 22(a) was to limit growth in government-- "to rein in increases in governmental revenue and expenditures." The voters were concerned with increases in monetary exactions mandated by government, e.g., property taxes, business license fees, and fees fixed by law for services of a public officer. The voters intended to limit the power of a county or other political subdivision to increase those charges which the government requires of its citizens--taxes, license and regulatory fees, and fees fixed by law for the services of public officers.

However, there are other charges which a county or political subdivision collects which are not mandated by law. These charges are those for goods and services which a citizen chooses to purchase. Such goods and services are often of a type offered both by private individuals and by government. Hospital services, including rooms, physician services, and medical goods and supplies fall into this latter category of charges.

A citizen needing health care often selects a public hospital operated by a county or other political subdivision to provide that care and contracts with the hospital for medical services and supplies. Here the relationship between the citizen and the county or political subdivision is a contractual one. The county does not levy the hospital charge. Rather the citizen requests certain goods and services from a county or political subdivision and agrees to pay a charge for those goods and services.

Section 22(a) prohibits counties and other political subdivisions from "levying" any new or increased "tax, license or fees" without voter approval. The use of the term "levy" in this provision supports the argument that the phrase "tax, license or fees" does not apply to charges collected by a county or other political subdivision pursuant to contract, but only to those charges which a political subdivision mandates or requires from its citizens. Clearly, hospital charges are not imposed by legal process, authority or power in the same sense as are taxes, licenses and fees. The hospital's right to payment of such charges is grounded in contract whereby a patient agrees to pay the charge and, if contested, upon proof that the charges are reasonable and for services necessary in connection with the treatment required or requested by the patient.

The use of the term "levy" in Section 22(a) reflects an intent that the phrase "tax, license or fees" applies to charges which are levied--those which constitute an unilateral imposition

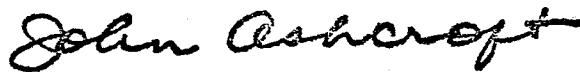
Mr. Carroll G. Leffler

by government on its citizens. Clearly, some reasonable and well-articulated line of demarcation between fees levied by local government which are subject to Article X, Section 22(a) and charges which are collected as a result of a contractual relationship between government and individuals who contract with government is necessary. Until such time as the courts speak without ambiguity, the ongoing functioning of local governments is dependent on some direction as to the proper interpretation of the Hancock Amendment. Thus, we conclude that the language of Article X, Section 22(a) which prohibits a county or other political subdivision from "levying" any new or increased tax, license or fees does not apply to those charges which are not unilaterally imposed by government but which are, in fact, grounded in the contractual relationship between the government and its citizens. We caution, however, that this opinion is nothing more than our best interpretation of the law, which in this case is uncertain. Ultimate resolution of this issue is dependent upon the judiciary.

#### CONCLUSION

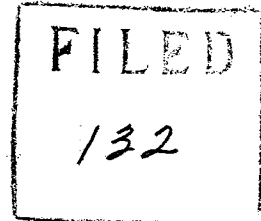
It is the opinion of this office that county hospital charges may be increased without voter approval. Such charges do not constitute taxes, licenses or fees within the meaning of Article X, Section 22(a) of the Missouri Constitution.

Very truly yours,



JOHN ASHCROFT  
Attorney General

December 21, 1982



John A. Pelzer  
Commissioner of Administration  
State Capitol Building  
Jefferson City, Missouri 65101

Dear Mr. Pelzer:

We have examined the abstract of title to the following described real property:

Part of the Northwest quarter of Section 12, Township 44 North, Range 12 West, in the City of Jefferson, Cole County, Missouri, more particularly described as follows:

From the southwest corner of the Northwest quarter of said Section 12; thence easterly along the south line of the Southwest quarter, 1098.9 feet; thence North 05 degrees 18 minutes 16 seconds east, 1149.0 feet, to a point on the northerly line of old U. S. Route 50, now Missouri Boulevard; thence easterly along the northerly line of Missouri Boulevard, on a curve to the right, having a radius of 1959.87 feet, a distance of 50.0 feet, to the east line of Howard Street, and the point of beginning for this description; thence continuing along the northerly line of Missouri Boulevard, on said 1959.87 foot radius, a distance of 405.97 feet, to the southwest corner of a tract of land described in Book 159, page 112, Cole County Recorder's Office; thence North 05 degrees 03 minutes 48 seconds east, along the westerly line of said tract, 546.07 feet, to the southerly line of a tract of land described in Book 157, page 283, Cole County Recorder's Office; thence North 05 degrees 16 minutes 25 seconds east, along the line of said tract, 59.91 feet; thence North 84 degrees 40 minutes

John A. Pelzer  
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46 seconds west, along the southerly line of said tract, 399.51 feet, to the east line of Howard Street; thence South 05 degrees 18 minutes 16 seconds west, along the east line of Howard Street, 553.72 feet, to the point of beginning.

Bearings are Magnetic.

Containing 5.266 acres.

The abstract consists of a caption sheet and pages numbered 2 to 135, inclusive, and is certified to December 3, 1982, at 5:00 p.m., by the Cole County Abstract Realty & Insurance Co.

It is our opinion, based solely upon information contained in the abstract, that marketable title to the above-described property is owned by Missouri Farm Bureau Federation, a corporation, subject to the following:

1. At page 119 of the abstract there is a warranty deed from which it appears that the present owner of the property, Missouri Farm Bureau Federation, is a corporation. Therefore, we require that there be recorded and included in the abstract a certificate of corporate good standing.
2. Highway construction easements as shown on pages 127 and 133 of the abstract, and a sewer easement as shown on page 83 of the abstract.
3. State, county and city taxes for the year 1982 are not marked paid and are a lien on the property.

For examination purposes, all affidavits appearing in the abstract are assumed by the examiner to be true.

Very truly yours,

JOHN ASHCROFT  
Attorney General

Wm. Clark Kelly  
Chief, Opinions Division

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